

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 23-12825 (MBK)
	.	
LTL MANAGEMENT LLC,	.	
	.	U.S. Courthouse
Debtor.	.	402 East State Street
	.	Trenton, NJ 08608
. . . . .	.	
LTL MANAGEMENT LLC,	.	Adv. No. 23-01092 (MBK)
	.	
Plaintiff,	.	
	.	
v.	.	
	.	
THOSE PARTIES LISTED ON	.	
APPENDIX A TO COMPLAINT AND	.	
JOHN AND JANE DOES 1-1000,	.	
	.	Thursday, June 29, 2023
Defendants.	.	AM SESSION
. . . . .	.	9:02 a.m.

TRANSCRIPT OF MOTION OF TO DISMISS THE SECOND BANKRUPTCY  
PETITION OF LTL MANAGEMENT LLC

BEFORE THE HONORABLE MICHAEL B. KAPLAN  
UNITED STATES BANKRUPTCY COURT JUDGE

Audio Operator: Kiya Martin

Proceedings recorded by electronic sound recording, transcript  
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1 (Proceedings commenced at 9:02 a.m.)

2 THE COURT: Okay. Good morning, everyone.

3 Mr. Gordon, good morning.

4 MR. GORDON: Good morning, Your Honor. Greg Gordon,  
5 Jones Day, on behalf of the debtor. So Mr. Jonas and Mr.  
6 Winograd and I had some conversations last night about  
7 logistics for today, and we have a proposal to make to Your  
8 Honor.

9 THE COURT: Negotiation.

10 MR. GORDON: Or actually, an agreement. It's a good  
11 day. So what we thought made sense was to put the MDL experts  
12 together.

13 THE COURT: Yeah.

14 MR. GORDON: And then have the financial experts  
15 after that. So what we've agreed to, subject to Your Honor's  
16 approval, is to go with witnesses in the order of Rave,  
17 Ferguson. And then we'll go to our witness Birnbaum, and  
18 Moline, but Moline just on the MDL piece of his report. And  
19 then we would come back in the afternoon and then do Burian,  
20 Mullin on his financial analysis, and then Bell.

21 THE COURT: All right.

22 MR. GORDON: So you get the topics --

23 THE COURT: I think it makes sense. It's a lot on  
24 our plate.

25 MR. GORDON: Yes.

1 THE COURT: All right. Then with whom are we  
2 starting?

3 MR. GORDON: I should also make an introduction, Your  
4 Honor. We have another new team member to my left here which  
5 is Bridget O'Connor. She is a partner in our Washington, D.C.  
6 office.

7 THE COURT: Welcome. Welcome aboard.

8 MR. SILVERSTEIN: Good morning, Your Honor. Adam  
9 Silverstein of Otterbourg PC for the Official Committee of Talc  
10 Claimants. At this time we call professor Theodore Rave as an  
11 expert witness to the stand.

12 THE COURT: Professor Rave.

13 MR. SILVERSTEIN: And, Your Honor, as Professor Rave  
14 settles on the stand, may we add to the Court's binder  
15 collection?

16 THE COURT: Absolutely. Professor, let me have you  
17 raise your right hand.

18 THEODORE RAVE, TCC'S WITNESS, SWORN

19 THE COURT: Thank you. Please have a seat.

20 THE WITNESS: Thank you.

21 THE COURT: Give your name and address, business  
22 address for the record.

23 THE WITNESS: Yeah. My name is Theodore Rave.  
24 Business address is 727 East Dean Keeton Street, Austin, Texas.

25 THE COURT: Thank you very much.

Rave - Direct/Silverstein

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1 DIRECT EXAMINATION

2 BY MR. SILVERSTEIN:

3 Q Good morning, Professor Rave. You have before you a  
4 binder with two tabs in it. Could you turn to Tab 1 which  
5 contains Exhibit 966.

6 A Yeah.

7 Q Could you tell the Court what Exhibit 966 is?

8 A Yes. This is the expert report I submitted in this case.

9 Q And do you understand that your expert report is being  
10 offered as if it were your direct testimony being delivered  
11 live in court today under oath?

12 A I do.

13 MR. SILVERSTEIN: Your Honor, at this time we offer  
14 into evidence Exhibit 966.

15 THE COURT: All right. Any objection?

16 MS. O'CONNOR: No objection.

17 BY MR. SILVERSTEIN:

18 Q Also, Professor Rave, let me just turn your attention to  
19 Tab 2 which is Exhibit 967. Could you identify for the Court  
20 what 967 is?

21 A This is the supplemental or rebuttal report that I put in  
22 in this case.

23 Q And, Professor Rave, do you understand that the  
24 supplemental or rebuttal report as Exhibit 967 is also being  
25 offered as testimony that you would be as if you were giving it

Rave - Cross/O'Connor

8

1 live in court under oath today?

2 A Yes, I do.

3 MR. SILVERSTEIN: Your Honor, at this point we offer  
4 into evidence Exhibit 967.

5 THE COURT: I assume no objection?

6 MS. O'CONNOR: No objection, Your Honor.

7 THE COURT: All right, thank you. Both 966 and 967  
8 are admitted into evidence. Thank you.

9 (TCC's Exhibits 966 and 967 admitted into evidence)

10 MS. O'CONNOR: May I proceed?

11 THE COURT: Absolutely.

12 CROSS-EXAMINATION

13 BY MS. O'CONNOR:

14 Q Good morning, Professor Rave.

15 A Good morning.

16 Q Nice to meet you in person.

17 A Yes, nice to see you in person.

18 Q Professor Rave, you've never served as an expert witness  
19 before, correct?

20 A That's correct.

21 Q And after law school and after your clerkship, you spent  
22 about three years in private practice, is that right, at a law  
23 firm?

24 A That's correct, yes.

25 Q And other than that brief stint at the law firm, you've no

Rave - Cross/O'Connor

9

1 experience representing a party in mass tort litigation,  
2 correct?

3 A That's correct.

4 Q And you have no experience representing a party in a mass  
5 tort settlement, right?

6 A That's correct.

7 Q Professor Rave, you're not offering an opinion on  
8 bankruptcy or the prospect of the bankruptcy system for  
9 resolving mass tort claims, right?

10 A No, I was not asked to offer an opinion on bankruptcy.

11 Q But you acknowledge that the MDL assumes that there's  
12 enough money to go around, but if there's not enough money,  
13 then the rules change, right?

14 A No. I don't think that's an assumption of the MDL.

15 Q Well, let me understand. I think I asked you and you  
16 agreed that the MDL assumes that there's enough money to go  
17 around. Do you agree with that, right?

18 A No. I don't think that's an assumption of the MDL.

19 MS. O'CONNOR: Okay. Could I see, please, Professor  
20 Rave's deposition at Page 128, Lines 19 to 22, please?

21 THE COURT: And are these in a binder?

22 MS. O'CONNOR: Yes. And I'll hand you --

23 THE COURT: Both for the witness and --

24 MS. O'CONNOR: Yes.

25 THE COURT: -- for the Court. Thank you.

Rave - Cross/O'Connor

10

1 THE WITNESS: Thank you.

2 BY MS. O'CONNOR:

3 Q Okay. Again, that's at Page 19, sorry, Page 128, Lines 19  
4 to 22.

5 A Sorry, which -- we're in the first tab here? One second.  
6 128 you said?

7 Q Yes.

8 A Okay. Got it.

9 Q And I asked you what about the bankruptcy court's ability  
10 to bind potential opt-out claimants in order to achieve  
11 financial finality, is that available in the MDL court. And  
12 you responded, as I said before, bankruptcy has lots of tools  
13 to assure mandatory treatment and to bind claimants  
14 involuntarily. In doing so, it disrupts their financial  
15 rights. MDL doesn't --

16 THE WITNESS: Excuse me, Your Honor.

17 MS. O'CONNOR: MDL doesn't --

18 THE WITNESS: I'm sorry. Ms. O'Connor misread the  
19 statement --

20 THE COURT: I have it. Thank you.

21 BY MS. O'CONNOR:

22 Q MDL doesn't have those tools because MDL assumes that  
23 there is enough money to go around. Do you see that, Professor  
24 Rave?

25 A I do.

Rave - Cross/O'Connor

11

1 Q Okay. Do you remember agreeing that the MDL assumes that  
2 there is enough money to go around?

3 A I don't specifically remember. But I'm certainly not  
4 going to dispute it.

5 Q Okay. Have you changed your understanding about whether  
6 the MDL assumes that there's enough money to go around?

7 A I don't think my understanding has changed. I think I was  
8 answering a question about assumptions of the bankruptcy  
9 system. I think very often, MDL deals with cases where there  
10 is enough money to go around. If there's not enough money to  
11 go around in the MDL system, there are tools to deal with that.

12 You could see a situation where you might have a limited  
13 fund class action which could be -- could mandatorily bind  
14 claimants. Or at that point, maybe another system is  
15 available.

16 Q Okay. And that system, when there is not enough money to  
17 go around, you agreed that the rules change, correct?

18 A When there's not enough money to go around, yes, then  
19 we're in a situation where traditionally equity has provided  
20 for equitable distribution. If there's not enough money to go  
21 around, you do things differently from when there is.

22 Q Okay. All right. Professor Rave, you agree that latency  
23 and future claims complicate the resolution of any mass tort in  
24 any form, right?

25 A Yes.

Rave - Cross/O'Connor

12

1 Q And in fact, you would agree with me that long latency  
2 period and number of people exposed are the biggest challenges  
3 for talc litigation, right?

4 A I think so, yes.

5 Q In fact, you co-authored an article entitled A  
6 Hub-and-Spoke Model of Multidistrict Litigation with Professor  
7 Francis McGovern that addressed this very topic, correct?

8 A It was one of the topics, yes.

9 Q And in that article you wrote, quote, but in "mega mass  
10 torts"--those involving multiple defendants and multiple  
11 products and activities over extended periods of time (for  
12 example, asbestos, silicone gel breast implants,  
13 opioids)--comprehensive resolution has proven elusive.  
14 Correct?

15 A I don't have it in front of me. But that sounds correct,  
16 yes.

17 Q Right. You don't dispute that you wrote that, right?

18 A Certainly not.

19 Q And you don't disagree with those words today, right?

20 A No, I do not.

21 Q Okay. But in your work in this case, you did not consider  
22 the asbestos litigation as one of the comparison MDL cases that  
23 you discussed in either of your expert reports, correct?

24 A I don't think it's correct to say that I didn't consider  
25 it.

Rave - Cross/O'Connor

13

1 Q Well, you didn't discuss it in the text, in the body of  
2 your report, in either of the reports other than a cite and a  
3 footnote, right?

4 A I did discuss it in a footnote. But I think it's more,  
5 you know, in terms of considering, yes I considered it. It's  
6 part of the knowledge that I have of the mass tort system and  
7 MDLs. What I was asked to provide in this case was an expert  
8 opinion on tools that the MDL process has for resolving mass  
9 tort cases. And so asbestos was not one of the examples that I  
10 used for providing tools.

11 Q Okay. So it was not one of the examples that you  
12 considered as the MDL tools, correct?

13 A Sorry. I just, I considered it. It was not one of my  
14 examples of tools for providing resolution.

15 Q Because a global resolution was not achieved in the  
16 asbestos cases, correct?

17 A That is correct. A global resolution was not achieved in  
18 the asbestos cases. The asbestos cases were ultimately  
19 resolved, but not through a global resolution.

20 Q You also did not consider the Roundup cases in your  
21 initial expert report, correct?

22 A again, I considered it as part of the base -- general base  
23 of knowledge I have about mass torts and MDLs. I did not use  
24 Roundup as an example in my report.

25 Q And you didn't discuss or address them in your report.

Rave - Cross/O'Connor

14

1 A I did not, no.

2 Q But you know that there was a proposed settlement  
3 agreement in Roundup?

4 A Yes.

5 Q And that big settlement announced was ultimately rejected  
6 by the Court.

7 A A class action settlement proposal in Roundup was rejected  
8 by the Court, yes.

9 Q And today, the Roundup litigation is still massively  
10 ongoing, correct?

11 A As far as I'm aware, Roundup is ongoing.

12 Q And you agree that in the Roundup cases, non-Hodgkin's  
13 Lymphoma has a long latency period, right?

14 A I do.

15 Q And that in order to try to account for the future claims,  
16 the proposed settlement in Roundup included two classes, those  
17 who had already been diagnosed with non-Hodgkin's Lymphoma and  
18 those who had been exposed but not yet diagnosed, right?

19 A Yes. I think that was (indiscernible) class.

20 Q But you're aware that the Court in Roundup ultimately  
21 rejected the proposed settlement.

22 A Yes.

23 Q Okay. And then finally, you also did not analyze the  
24 silicone breast implant litigation. And by that I mean you  
25 didn't discuss it or write about it in your expert reports,

1 right?

2 A I think I mentioned it, but it was not something that I  
3 discussed in depth.

4 Q But you acknowledge that the silicone breast implant cases  
5 also involved latent injuries and unknown future claimants,  
6 right?

7 A Yes.

8 Q And you're also aware that no global settlement was  
9 achieved in those cases.

10 A So the resolution in silicone gel breast implant was  
11 resolved through several different settlements. One of the  
12 defendants resolved its liability in bankruptcy. Excuse me. I  
13 believe that was Dow Corning. Others of the defendants  
14 resolved their liability through various settlement structures  
15 in the MDL process.

16 Q Well, and to be clear, you didn't discuss or consider the  
17 Dow Corning bankruptcy in your report either, right?

18 A Again, I considered it as part of the general base. But  
19 no, it wasn't one of my examples.

20 Q And you didn't discuss any of the settlements or attempts  
21 to resolve the silicone breast implant cases in your report.

22 A Not in detail.

23 Q Okay. But what you did discuss in your expert report with  
24 respect to cases that involved latency, your focus was on the  
25 NFL concussion case, correct?

Rave - Cross/O'Connor

16

1 A That was one of the examples I used, yes.

2 Q Okay. And you acknowledge that one of the differences  
3 between the NFL concussion case and the talc litigation is that  
4 the universe of potential claimants in the NFL litigation is  
5 more knowable than what we have in the talc litigation,  
6 correct?

7 A Yes.

8 Q And that's because the future plaintiffs in the NFL  
9 concussion litigation were a group of retired football players.  
10 And here in the talc litigation, we have a group of consumers  
11 who purchased an over-the-counter product, right?

12 A Yes.

13 Q And so the NFL would have better records of who was  
14 employed by them versus people who got talc products in stores  
15 --

16 A Yes.

17 Q -- over the years, right?

18 A Yes.

19 Q So turning then, we touched on bankruptcy. In assessing  
20 the ability of the MDL system to provide fair and efficient  
21 resolution of mass torts disputes, you did not discuss or  
22 assess, offer opinions on examples of mass tort defendants that  
23 filed for bankruptcy despite efforts to achieve global  
24 resolution of their cases in the MDLs, correct?

25 A I think that's correct, yes.

Rave - Cross/O'Connor

17

1 Q And so you did not discuss or assess the example of W.R.  
2 Grace, a defendant in the asbestos cases.

3 A I did not.

4 Q And in fact, as of the time of your deposition in this  
5 case, you were not aware that W.R. Grace was a defendant in the  
6 asbestos cases.

7 A I was not aware of the specifics of the W.R. Grace  
8 litigation. I knew they manufactured asbestos, but I didn't  
9 know where they fit generally in the larger asbestos  
10 controversy.

11 Q And we already touched on Dow Corning. But you also did  
12 not address or discuss the Purdue Pharma bankruptcy filing  
13 following its involvement as a defendant in the opioids MDL,  
14 correct?

15 A I didn't discuss Purdue Pharma. Specifically, I think I  
16 did point out that Purdue Pharma, that while one defendant  
17 filed for bankruptcy in the -- well, not one. There were  
18 multiple. But Purdue Pharma was one of the defendants that  
19 resolved its opioid liability through bankruptcy. Many other  
20 defendants in the opioid litigation were able to  
21 comprehensively resolve their liability in the MDL process.

22 Q But you did not discuss the bankruptcy aspect of that  
23 opioids outcome in your report, correct?

24 A No, I did not. Again --

25 Q Right.

Rave - Cross/O'Connor

18

1 A -- I was not offering an opinion on --

2 Q That was my question.

3 A Sorry.

4 Q Professor Rave, you agree that MDL courts generally do not  
5 approve or deny approval for settlement agreements, correct?

6 A They -- if it's a non-class settlement agreement,  
7 generally the MDL court will not approve or reject formally.  
8 Sometimes the judges weigh in informally on the merits of the  
9 settlement. If it's a class action settlement, Rule 23  
10 requires the Court to assess the fairness.

11 Q And you also agree that MDL courts do not have the power  
12 to bind parties to a settlement?

13 A If it's a class action settlement -- if it were a  
14 mandatory class action settlement like a limited fund, they  
15 would have the power to bind parties. If it's an opt-out  
16 class, then they have the power to bind parties who don't opt  
17 out. If it's a non-class settlement, then it's an opt-in model  
18 and they don't have the power to bind parties who do not opt  
19 in.

20 Q Okay. So for a non-class settlement, you agree that MDL  
21 courts do not have the power to bind parties to a settlement?

22 A Yes.

23 Q And whereas you're aware that bankruptcy courts, and you  
24 agree that bankruptcy courts can act in a mandatory manner.

25 A Yes.

Rave - Cross/O'Connor

19

1 Q You also recognize that MDLs do not have the ability to  
2 bind all claimants beyond the scope of the MDL proceeding  
3 itself other than federal parties to any settlement that's  
4 achieved through the MDL process.

5 A So I just, I want to be precise here. So the MDL -- if  
6 parties who were not -- if entities or individuals enter into a  
7 settlement and they were not parties in the federal MDL but the  
8 settlement is negotiated in the MDL --

9 Q No, that's not my question.

10 A Okay.

11 Q So I'll --

12 A Sorry. Then I didn't understand.

13 Q Right. So we've got the MDL proceeding itself. It has  
14 federal parties to that MDL proceeding.

15 A Yeah.

16 Q If there's a settlement among those MDL parties, that, the  
17 MDL court does not have the ability to bind other claimants  
18 outside that MDL proceeding to that settlement, correct?

19 A The settlement could bind the parties to the settlement.  
20 Many MDL settlements include parties who were not in the MDL  
21 proceeding. But the MDL -- I think where you're going with  
22 this generally is the MDL judge doesn't have the power to reach  
23 out and bring everyone in. But if the settlement is broader  
24 than just the parties in the MDL, then the MDL judge would have  
25 the power to enforce that settlement, yes.

Rave - Redirect/Silverstein

20

1 Q That was my question. And the MDL does not in fact have  
2 any procedural tools that require state courts to coordinate  
3 with the federal MDL, correct?

4 A Require, no. MDL judges frequently work cooperatively  
5 with state court judges.

6 Q In fact, you've written law review articles on this very  
7 topic, right?

8 A I have, indeed.

9 Q And in an article entitled MDL in the States, you detailed  
10 that roughly half of the states do not have a corollary  
11 procedure to the federal MDL mechanism, correct?

12 A That is correct, yes.

13 Q So, Professor Rave, you agree that the bankruptcy court,  
14 unlike the MDL court, can bind all claimants, right?

15 A Yes, I think so.

16 Q Okay. Thank you, Professor Rave.

17 MS. O'CONNOR: That's all I have.

18 THE WITNESS: Thanks.

19 REDIRECT EXAMINATION

20 BY MR. SILVERSTEIN:

21 Q Good morning, Professor Rave.

22 A Good morning.

23 Q Have you testified in Court before?

24 A I have not.

25 Q Okay. I'm going to ask you some questions, and I would

Rave - Redirect/Silverstein

21

1 like to start with following up on Ms. O'Connor's questions to  
2 you about your experience.

3 Ms. O'Connor asked you some questions about your  
4 experience as a young lawyer at a firm and in connection with  
5 mass tort. Could you just take a minute to describe your  
6 background to the Court?

7 A Sure. So I graduated law school in 2006 and clerked for  
8 two federal judges, and then worked at a law firm. The one  
9 you're referring to I think is Jones Day. I was a lawyer at  
10 Jones Day for about three years in the appellate practice. I  
11 did very little work in mass torts. Some, but not much. And I  
12 certainly didn't negotiate any settlements.

13 Then I did a fellowship at NYU School of Law and went into  
14 teaching. And for eight years I was a professor at the  
15 University of Houston Law Center. The last two years I've been  
16 a professor at the University of Texas. And I've spent the  
17 past decade studying and teaching and writing about complex  
18 litigation, specifically multi-district litigation and mass  
19 tort litigation.

20 Q Have you been sitting in court during this trial?

21 A I have, yes. Except for the end of yesterday.

22 Q Did you hear Judge Kaplan's concerns or questions about  
23 having live testimony over a policy debate between the MDL  
24 system and the bankruptcy system?

25 A I did, yes.

Rave - Redirect/Silverstein

22

1 Q are you offering any opinions on a policy debate between  
2 the MDL system and the bankruptcy system?

3 A I don't think I am. I don't think we're having a policy  
4 debate. I was asked in this case to offer an opinion on the  
5 tools that the MDL system has for resolving mass tort cases. I  
6 never understood my job to be a comparative job.

7 Q And do you have an opinion as to whether the tools in the  
8 MDL afford the parties in the talc litigation to achieve a fair  
9 and efficient and equitable resolution of the claims?

10 A I do. I think the tools are there in MDL. And MDL is  
11 extraordinarily flexible and has lots of different tools that  
12 the parties might use. And the tools are there to provide  
13 resolution, yes.

14 Q As you've sat in court this week, have you heard or  
15 observed anything during the trial, including Ms. O'Connor's  
16 cross examination of you, that has led you to alter or change  
17 any of the opinions you rendered in your expert reports?

18 A No.

19 Q Now, Ms. O'Connor asked you some questions about the  
20 handling of mass tort disputes involving future claims with  
21 latencies. Do you --

22 A Yes.

23 Q -- remember those questions in general?

24 A Generally, yes.

25 Q Do you have an opinion as to whether parties can

1 equitably, efficiently, and comprehensively resolve mass tort  
2 disputes involving future claims with long latency periods in  
3 the tort system?

4 A I do, yes.

5 Q And what is your opinion?

6 A I think that the tort system gives parties the tools to  
7 resolve these claims. You could do it through a class action  
8 like we saw in the NFL concussion case which involved latent  
9 injuries and future claimants. And if you don't use a class  
10 action, there are other tools, as well.

11 Q Throughout the first bankruptcy of LTL and now in this  
12 bankruptcy, there's been some discussion about the Supreme  
13 Court decisions in Amchem and Ortiz, and the impact that those  
14 decisions have on the ability to resolve claims, future claims  
15 with long latencies in the tort system.

16 So first, can you take one minute to describe what the  
17 holding of Amchem and Ortiz was, and then I'm going to ask you  
18 a follow up question.

19 A It seems like you're opening this up as a classroom. So  
20 I'll be very brief on these cases. I'm sure everyone in the  
21 room has read them. So the holding of Amchem is that you  
22 cannot use a class action to bind future claimants when there  
23 are no structural assurance of adequate representation for  
24 those future claimants.

25 And the problem in Amchem was that the class action that

1 was designed to resolve the asbestos litigation, litigation  
2 involving -- that particular settlement I think involved over  
3 20 defendants. And we're talking about a multitude of  
4 different products that may have contained asbestos over a long  
5 period of time.

6 The class action settlement in that case lumped the future  
7 claimants and the present claimants into a single class and  
8 didn't have separate representation. And that was the biggest  
9 problem in that case. And the Court said you can't do that.  
10 You can't bind future claimants unless you have structural  
11 assurance that they'll be adequately represented.

12 Q And what was the holding on Ortiz?

13 A Ortiz was also an asbestos settlement. Ortiz was  
14 different from Amchem. It was a mandatory class action, a  
15 23(b)(1)(B) limited fund class action. And the holding on  
16 Ortiz is that the parties can't agree on the definition of the  
17 limited fund.

18 So the settlement in Ortiz, basically the proposed fund  
19 was the pot of money that was the settlement of the defendant's  
20 insurance coverage dispute. And the Court held that when  
21 you're going to use a mandatory process like a 23(b)(1)(B)  
22 class action, the fund has to be actually limited, not limited  
23 by the agreement of the parties. And the defendant has to put  
24 all of its equity on the table.

25 So that was the biggest problem in Ortiz. Also, it didn't

1 -- it also had a sub-classing problem as well. There was no  
2 structural assurances for adequate representation of future  
3 claimants.

4 Q All right. So in your opinion, how are the parties in a  
5 mass tort dispute involving future claims and long latencies  
6 able to resolve their disputes through a settlement class  
7 action following Amchem and Ortiz?

8 A I think that Amchem and Ortiz certainly don't foreclose  
9 this. If you design the class action settlement to provide the  
10 structural assurances of adequate representation that were  
11 missing in those cases, then a class action isn't available to  
12 them.

13 Q Are there any settlement class actions that have been  
14 approved by courts involving long latencies in future claims?

15 A This is the -- so yes is the answer. The NFL concussion  
16 litigation involved long latency period and future claims. And  
17 the parties and the Court there recognized the future claims  
18 problem, and very early in the litigation appointed class  
19 counsel for the subclass of future claimants.

20 And so that class counsel was then able to be present in  
21 the settlement negotiations. And the district court certified  
22 the class with two subclasses, one subclass of currently  
23 injured NFL players and one subclass of future claimants who  
24 might develop injury down the road, certified the class,  
25 approved the settlement, and the Third Circuit affirmed it.

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1 THE COURT: If I may just interject?

2 MR. SILVERSTEIN: Sure. Of course.

3 THE COURT: Professor, an you describe a structural  
4 mechanism for future unidentifiable claimants? Again the  
5 difference would be --

6 THE WITNESS: Yeah.

7 THE COURT: What would be an example of a structural  
8 mechanism to address future claimants who cannot be identified  
9 at this juncture?

10 THE WITNESS: Yeah. So I think the structural  
11 mechanism is the same, right. You would have -- you would  
12 appoint -- you would have a subclass for future claimants. And  
13 then that subclass would have separate representation, separate  
14 subclass counsel.

15 The challenge with unidentifiable claimants, I don't  
16 think so much is a structural challenge. I think the challenge  
17 there is more a notice challenge.

18 THE COURT: Notice. So would that structural format  
19 address the concerns in Amchem?

20 THE WITNESS: So I think it certainly addresses the  
21 concerns in Amchem, right. The biggest problem in Amchem was  
22 there was no one looking out for the futures, and so the deal  
23 looks like it's selling out the future claimants.

24 So if you have that structure in place where you have  
25 someone whose job it is to represent the future claimants, and

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1 who actually has a financial incentive to do so, right. So the  
2 attorney fee award for the future subclass counsel is going to  
3 be based on the recovery of the futures.

4 It address that, right. There's still -- the notice  
5 THE COURT: Notice issue.

6 THE WITNESS: -- challenge -- the notice is a  
7 separate challenge. I don't think notice is an insurmountable  
8 challenge. We have lots and lots of class actions where it's  
9 hard to identify the class of people that you're giving notice  
10 to.

11 So, like, think of your sort of ordinary consumer  
12 class action or your ordinary anti-trust class action. You  
13 have a class of people that are very difficult to identify,  
14 right. It's not like you have a list of names that you can  
15 just mail to.

16 And there are lots and lots of notice programs that  
17 are designed to get at that problem. So you do a multimedia  
18 kind of notice. You would do print ads and TV ads and internet  
19 advertising over a long period of time to make sure that the  
20 message is getting out there.

21 And an additional challenge, I think, in Amchem and  
22 Ortiz, well not Ortiz because that was mandatory. But in  
23 Amchem, an additional challenge was that when you're talking  
24 about the presence of -- when you're talking about asbestos,  
25 asbestos was in hundreds of different products. And people

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1 didn't know whether they were ever exposed to asbestos.

2           The difference here, we're talking about a consumer  
3 product that people know if they've used or not used. If you  
4 put out a notice that said have you used Johnson's Baby Powder,  
5 that's going to get people's attention in a way that have you  
6 been exposed to asbestos isn't going to get their attention.

7           THE COURT: All right, thank you.

8           MR. SILVERSTEIN: And, Your Honor, can I follow up on  
9 that because you anticipated what I was going to ask Professor  
10 Rave.

11 BY MR. SILVERSTEIN:

12 Q       So can we turn to Roundup because Roundup is an action  
13 where the Court rejected a settlement class action involving a  
14 large class of unidentified future claimants. Does Roundup  
15 foreclose a settlement class action involving a large class of  
16 unidentified claimants?

17 A       No, I don't think it does.

18 Q       And why is that?

19 A       Well, I think the biggest problem in Roundup was not the  
20 way the class was structured. The biggest problem in Roundup  
21 was that the Judge thought it was a bad deal. The Judge  
22 thought that it didn't provide enough money for future  
23 claimants.

24           And Roundup -- so Roundup involved a latency period for  
25 non-Hodgkin's lymphoma that was, I don't know exactly, more

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1 than a decade, a long latency period. The proposed settlement  
2 in Roundup involved a medical monitoring program that was going  
3 to last for I think four years, and a compensation fund that  
4 was going to last for four years.

5 And the Judge thought that that didn't provide nearly  
6 enough protection for future claimants because they might not  
7 get sick for ten to fifteen years, but they only have four  
8 years of medical monitoring and four years to make a claim. So  
9 I think the primary problem in Roundup was the substance of the  
10 settlement, not -- not the use of a class action in any future  
11 case.

12 Q But didn't the Court in Roundup comment on the challenges  
13 of providing notice to a large unidentified class of future  
14 claimants?

15 A Yes. So again, notice -- we're back to the notice issue.  
16 Notice is a challenge in these cases. And the Court in Roundup  
17 acknowledged that. But again, I think the biggest problem in  
18 Roundup were the specifics of the notice.

19 So the notice in Roundup said something like exposed to  
20 weed killers? You may be entitled to compensation. If you  
21 have non-Hodgkin's lymphoma, you get some -- you may be  
22 entitled to up to some large settlement amount.

23 And the Judge said that notice is not well-designed to  
24 reach the people who have been exposed and don't know if their  
25 risk. Something -- and the Judge, you know, was quite clear in

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1 the transcript of the argument which he incorporates by  
2 reference into his decision that he's not saying that you could  
3 never use a class action for a case like this.

4 This particular class action settlement wasn't good, and  
5 the notice wasn't good. And notice that said something more  
6 like exposed to weed killers? You could get cancer. This  
7 settlement could affect your rights, would do a lot more to get  
8 the attention of the unidentifiable class of people.

9 Q Couple of more follow ups on the subject of settlement  
10 class actions. And then I want to switch the subject. Were  
11 you in court when Mr. Murdica testified yesterday that in his  
12 view, bankruptcy is the only form in which a fiduciary can be  
13 appointed to represent the interest of future claimants?

14 A I was in court then, yes.

15 Q And do you agree with that assessment by Mr. Murdica?

16 A No. I don't agree with that assessment.

17 Q And why is that?

18 A As I think I mentioned to Judge Kaplan earlier, in a class  
19 action you would have a future claimant subclass. And that  
20 future claimant subclass would have separate class counsel  
21 appointed to represent that future claimant subclass. That  
22 class counsel would have a fiduciary obligation to represent  
23 the interest of the future claimants.

24 And beyond just the fiduciary obligation, it would also  
25 have an economic incentive to do a good job representing the

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1 future class because the award of attorneys fees is going to  
2 depend on how well the future class does.

3 Q Let's talk about the asbestos MDL because that involved  
4 long latencies and future claims. And Ms. O'Connor asked you  
5 some questions about that. Does the activity or lack of  
6 activity in the asbestos MDL change any of your opinions that  
7 the MDL has the tools available to it to resolve the talc  
8 claims?

9 A No. It doesn't. I think that the asbestos MDL is very  
10 different from this situation that we're looking at here.  
11 Earlier, Ms. O'Connor asked me about the idea of mega mass  
12 torts that I talked about in my article with Professor  
13 McGovern.

14 What we mean by mega mass torts is like the asbestos MDL,  
15 mass torts involving many, many different defendants with many,  
16 many different products over a long period of time. These  
17 disputes are just far more complicated. And I don't mean to  
18 minimize the complication of this dispute. This is -- this is  
19 obviously a challenging mass tort. But it's not anywhere near  
20 the complexity of the asbestos MDL.

21 Q Are there tools available in the tort system for resolving  
22 mass torts with future claims and latencies other than through  
23 a settlement class action?

24 A There are, yes.

25 Q And what tools are available to parties to

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1 comprehensively, equitably, and efficiently resolve mass tort  
2 disputes involving future claims with long latencies outside  
3 the context of settlement class action?

4 A So as I talk about a little bit in the report, one of the  
5 advantages of a class action is it's an opt-out model. But you  
6 can also design settlements on an opt-in model. So you could  
7 have either a series of master settlement agreements or a  
8 global master settlement agreement that resolves claims like  
9 this.

10 You could -- if you want to -- if you're looking to  
11 resolve future claims, you can have a model that pairs up front  
12 benefits like medical monitoring with back end benefits like an  
13 insurance component like we saw in the World Trade Center  
14 settlement. And you use the up front benefits like medical  
15 monitoring to incentivize people to opt-in to the program. And  
16 then you have the back end compensation if it turns out that  
17 they get sick.

18 I mean, one of the advantages of using medical monitoring  
19 is it also mitigates the harm. If you catch lots of diseases  
20 early, then the people don't get as sick. So that's an  
21 advantage, as well. If you make the settlement program  
22 attractive, people will opt in.

23 Q Are there any other tools available besides a World Trade  
24 trust-like model?

25 A Sure. You know, one of the advantages of the MDL system

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1 is its flexibility. There are lots and lots of different ways  
2 that you could -- that you could structure these sorts of  
3 settlements. And you don't have to do it all in one  
4 transaction. You can -- you can use multiple tools at the same  
5 time. And there -- there are ways that you can -- that you can  
6 set this up.

7 Q Are there any examples of MDLs involving future claims and  
8 long latencies that were comprehensively involved -- I'm sorry,  
9 comprehensively resolved simply by just resolving the present  
10 claims, even though there were future claims as well?

11 A Yes. Yes, there were. So, I mean, one example is the  
12 Actos litigation. So Actos involved a diabetes drug that had a  
13 long latency period I think of more than a decade of latency.  
14 And the parties in the Actos litigation reached a global  
15 non-class master settlement agreement that resolved all of the  
16 presently-pending claims. It didn't expressly deal with the  
17 future claims. It resolved all of the present claims.

18 It had some provisions in it that made it less attractive  
19 for lawyers to pursue those claims in the future. And the  
20 Actos settlement seems to have worked. It resolved I think  
21 about 9 or 10,000 currently pending claims. And there's no  
22 Actos litigation to speak of today.

23 Q Okay. A couple of more questions, and then I'll conclude.  
24 Ms. O'Connor asked you about examples of companies that file  
25 for bankruptcy after being defendants in an MDL. And there are

1 examples of that, right? You were asked about that.

2 A Certainly, yes.

3 Q And Ms. O'Connor asked you about W.R. Grace, Dow Corning,  
4 Purdue Pharma as examples. Are there companies that have many  
5 defendants in the asbestos MDL, the silicone breast implant  
6 MDL, and the opioid MDL that have managed their litigation in  
7 the MDL without filing for bankruptcy?

8 A Yes. In each of those cases, some of the defendants used  
9 bankruptcy to resolve their liability while other defendants  
10 involved in the same litigation did not. They resolved their  
11 liability through the MDL system.

12 You know, we've talked a lot about asbestos. Asbestos is  
13 a very complicated MDL, complicated mass tort. It's bigger  
14 than just the MDL. Bankruptcy didn't resolve asbestos either.  
15 Even after many of the companies filed for bankruptcy, there  
16 was still ongoing asbestos litigation in the MDL.

17 And I think as of, I want to get the dates right. I think  
18 as of 2009 when Judge Robreno took over the asbestos MDL, I  
19 think there was something in the order of 185,000 cases still  
20 pending in the asbestos MDL.

21 And Judge Robreno looked at it and said well, it seems  
22 like we're not going to have a global settlement here, and so  
23 we're just going to move forward with the litigation. And he  
24 started simplifying cases and setting them on schedules towards  
25 remand.

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1 And within I think about three years, he successfully  
2 resolved the vast, vast majority of those 185,000 claims.  
3 There's something on the order of 750 remands to transferor  
4 courts. Nowhere -- I don't know the exact number, but nowhere  
5 near 750 of those went to trial. And today, there are -- the  
6 MDL is closed. There are no -- there's no ongoing asbestos  
7 MDL.

8 Q And what's the percentage of MDL cases that are resolved  
9 in the MDL court without being remanded?

10 A It's more than 97 percent of cases that have been  
11 transferred into an MDL are resolved in the MDL district, so  
12 either by dismissal or motion, or quite often by settlement.  
13 Something less than three percent are ever remanded to the  
14 transferor courts.

15 Q Okay. One last question. Ms. O'Connor showed you your  
16 deposition testimony from earlier this month and asked you  
17 questions about whether the MDL assumes that there's enough  
18 money to go around. And I know you gave an answer to that.  
19 But could you elaborate on when bankruptcy is appropriate  
20 following an MDL as you've, in your opinion, as you've seen it?

21 A Yeah. And again, I don't claim expertise on bankruptcy.  
22 But as I understand it, bankruptcy has -- and I'm not doing a  
23 comparison, right. I don't -- I didn't view my role in this as  
24 participating in a policy debate. I have no doubt that  
25 bankruptcy also has powerful tools for resolving claims.

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1 One of the things that makes those tools so powerful is  
2 that they can alter or modify or infringe the fundamental  
3 rights of litigants. And my understanding is you only get to  
4 do that when there's not enough money to go around.

5 MR. SILVERSTEIN: Your Honor, I have no further  
6 questions. Thank you, Professor Rave.

7 THE COURT: All right. Before, Ms. O'Connor, let me  
8 just ask another question. When you just said infringe the  
9 rights of litigants, talking about jury trials?

10 THE WITNESS: So I'm talking -- so maybe infringes  
11 isn't right. So --

12 THE COURT: Because I was struck by the fact that you  
13 said --

14 THE WITNESS: Yeah.

15 THE COURT: -- in the end, only three percent  
16 actually go to trial, or at least are remanded back. And even  
17 those settle. So --

18 THE WITNESS: Yeah, so --

19 THE COURT: -- we're not talking about a significant  
20 --

21 THE WITNESS: So I think it's more than just trial,  
22 right. It's the right to decide what to do with your case.  
23 And so you have the right in the tort system to go to jury  
24 trial. And very often, that's not going to be the best use of  
25 your right. Right? The settlement is going to be better for

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1 everyone involved. And you have the right to choose whether to  
2 settle or to press forward with your claim.

3 And most parties choose to settle because usually  
4 settlement is a better deal. And I think that's one way that  
5 we can be confident that the settlement that's negotiated in  
6 that system is a good deal for everyone involved. So I don't  
7 really have any doubt that bankruptcy can create a lot of  
8 value.

9 Where I worry is how that value gets distributed,  
10 right. Is it just creating value for the defendant, or is  
11 there some mechanism to make sure that the claimants are going  
12 to share in that value? And I think the mechanism in the tort  
13 system to make sure is that claimants have to consent to a  
14 settlement.

15 So they've had to decide that this is a good deal.  
16 This isn't just a good deal for the defendant. This is a good  
17 deal for everyone. And so I'm a lot more confident there that  
18 they're sharing that value. And I think that's an important  
19 part of the right that's protected.

20 THE COURT: If you sat in on yesterday's hearing, my  
21 sympathies. A lot of what was discussed was the variations in  
22 the types of cancers that are being addressed both of the MDL  
23 and of the tort system and as part of a potential settlement  
24 within the bankruptcy. And I learned of a term borderline  
25 cancers --

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1 THE WITNESS: Yeah, I learned that, too.

2 THE COURT: -- that were not addressed in the MDL.

3 Does the fact that there seem to be at least half a dozen  
4 significant types of cancer that are not being addressed in the  
5 MDL, does that change your analysis or impact your analysis on  
6 the ability of MDL to address the talc claims as far as notice  
7 and confusion and talking about giving notice, and also  
8 comprehensiveness.

9 THE WITNESS: So I don't think it changes my opinion.  
10 I think the defendants' position is that those claims are not  
11 compensable, right. And I think we have to -- when we're  
12 talking about parties' rights and what they have rights to, I  
13 think we have to do that by reference to the substantive law.

14 And how we figure that out in the tort system is we  
15 have the litigation process. And sometimes that leads to  
16 consensual resolution. And if it doesn't, it's going to lead  
17 to adjudication. And the consensual resolution's all done in  
18 the shadow of that.

19 And so if these claims are not compensable in the  
20 tort system because the plaintiffs have no right to recover,  
21 then they shouldn't get compensation. And so, you know, that,  
22 the MDL system has filters built in for that to make sure that  
23 its claims that are valid claims are getting paid, and ones  
24 that are not are not.

25 THE COURT: Fair enough. Thank you. Ms. O'Connor?

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1 MS. O'CONNOR: Yes, Your Honor. I'm not going to say  
2 I have just one question. Some redirect.

3 RECROSS-EXAMINATION

4 BY MS. O'CONNOR:

5 Q And you were just talking about the points of settlement  
6 being, in the MDL context, being consensual. I want to follow  
7 up on that. With respect to -- well, let me start here. Your  
8 assertion is that it's still possible to resolve the tough  
9 litigation through a class action settlement, through a class  
10 settlement in the MDL process, correct?

11 A Yes.

12 Q But you have not provided, other than the NFL concussion  
13 case which does not involve unknown future claimants, you have  
14 not provided any example of where this has been done  
15 post-Amchem or Ortiz.

16 A Well, I mean, I think the NFL is a pretty big example.  
17 But I haven't provided another example, no.

18 Q Right. It's a pretty big -- it's an example that has a  
19 key difference insofar as the future claimants are known in  
20 that case, correct?

21 A So yes, we have -- we have lots and lots of class actions  
22 that deal with that other problem. I think we have two  
23 different problems here, right --

24 Q My question is have you provided an example of a case,  
25 post-Amchem or Ortiz, where there are unknown future claimants

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1 and that has settled through a class settlement?

2 A Unknown future claimants with latent injuries.

3 Q Correct.

4 A No. I don't have another example.

5 Q Okay. Now, when it comes to Your Honor's key question  
6 focusing on the ability to provide notice to these unknown  
7 future claimants, you concede that there is no way to provide  
8 notice to plaintiffs who have yet to manifest their disease at  
9 this point, correct?

10 A No.

11 Q Well, your suggestion is that you can run commercials,  
12 correct?

13 A You could do a big multimedia notice campaign, yes.

14 Q And so is it your suggestion then that you would then run  
15 the commercials or the advertisements every year for decades  
16 going forward?

17 A That would -- that could be -- no, you wouldn't have to do  
18 that. You would do it up to the opt-out date.

19 Q Well, so for those individuals who don't know that they  
20 could or would be injured at the time of seeing those  
21 advertisements, those are unknown future claimants where  
22 there's latent injuries. They wouldn't be aware of those  
23 injuries, correct?

24 A They would know whether they used talc, and that would be  
25 what the notice would be targeted at. They wouldn't know yet

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1 whether they're injured or not.

2 Q So under your proposal, you would not achieve finality in  
3 the near term, correct?

4 A No. I don't think that's correct. If we're talking about  
5 a class action, it would -- you could do an opt-out class  
6 action, and then you would have a program to hand out money  
7 over an ongoing period of time.

8 Q You'd hand out money over an ongoing period of time --

9 A It wouldn't be any different from a bankruptcy trust,  
10 right. The bankruptcy trust isn't going to hand out money to  
11 everyone tomorrow. It's going to hand out money to people when  
12 they get sick.

13 Q Based on submitting claims prior to an opt-out deadline,  
14 according to your suggestion here today. This is not laid out  
15 in your report, correct? And you're not a bankruptcy expert,  
16 correct?

17 A No, I'm not a bankruptcy expert. But let's talk about the  
18 class action. So it would be you would have -- there would be  
19 an opt-out date. And if you didn't opt out by that date, then  
20 your claims would be channeled into the settlement and you  
21 would submit a claim form when you got sick.

22 Q You talked about the opt-in model. If a party chooses to  
23 opt out in the MDL, the court has no ability to bind that party  
24 to the settlement, correct?

25 A Correct.

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1 Q And conversely, the court has no ability to compel a party  
2 to opt into the settlement.

3 A Correct.

4 Q Right? There's therefore no finality achieved if a party  
5 opt out or if parties do not opt into a settlement in the MDL,  
6 correct?

7 A You may not get every single claimant. But you could get  
8 enough of the claimants to participate that it would be -- that  
9 it would substantially resolve the dispute. It would be  
10 sufficient finality.

11 Q If you got a global resolution, correct?

12 A Yes. If you got a global resolution.

13 Q If. But there's no guarantees, right?

14 A No. There's -- like I said before, this is premised on  
15 making sure that the deal is attractive enough that people want  
16 to participate in it.

17 Q But you're aware that there are many examples where that  
18 hasn't happened, but those examples that we talked about today  
19 that aren't discussed in your reports, correct?

20 A The -- I mean, I can't sit here and tell you that every  
21 case is going to settle on particular terms. Sometimes the  
22 parties reach a deal and sometimes they don't.

23 Q Okay. You talked today about the Roundup case. Again,  
24 that wasn't addressed in your report. But you don't know if  
25 another longer period would have sufficed to the Court in that

1 case, correct?

2 A No. I don't think anyone could know that. The Court left  
3 the door open to that. The Court said -- you know, I'm not  
4 saying here no class action could ever be settled -- could ever  
5 be certified in this case. The one that is before me is not  
6 going to work.

7 Q So what you know today is that the class that was proposed  
8 was rejected.

9 A Yes.

10 Q Okay. And the speculation today that was not included in  
11 your report is that it needed a longer period, or what another  
12 proposal might be, you haven't addressed that in your report,  
13 and it wasn't included in the court decision, correct?

14 A The court decision discussed the problems with the  
15 currently proposed settlement. The court decision only decided  
16 that it was not going to certify the class and approve the  
17 settlement that was proposed to it.

18 The court doesn't say anything to foreclose the use of  
19 class actions in another settlement. And as I said, the court  
20 decision incorporates by reference the transcript of the  
21 hearing. And at the hearing, Judge Chhabria was very  
22 thoughtful about this.

23 He asked the parties, you know, trying to drill down on  
24 the question is this a problem with the notice here, or is this  
25 an insurmountable problem with notice in any case. And Judge

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1 Chhabria indicated that he -- that for him, it was that the  
2 problem was the notice in this case.

3 Q Right. Because as we stand here today, and as you've  
4 already conceded, we don't have an example post Amchem or Ortiz  
5 of a case with unknown future claimants and latency issues  
6 where the class has approved a class settlement like the one  
7 that you've suggested is possible, correct?

8 A We don't have a -- we don't have an example with both  
9 future claimants and latency and an unknown class. We have  
10 examples of many class actions that deal with unknown classes  
11 of people, and we have a very good example I think in NFL of a  
12 personal injury with a long latency period.

13 Q Okay. And on the topic of personal injury, I'm glad you  
14 mentioned that. The opioid settlements that you mentioned,  
15 those did not resolve product liability claims, correct?

16 A They were not personal injury claims. These were  
17 primarily -- primarily a nuisance claim. Well, there were a  
18 lot of causes of action, but they were not -- not the kind of  
19 product liability claim we're talking about here.

20 Q Those settlements were actually with states,  
21 municipalities, other subdivisions for abatement relief and  
22 claims of that nature, correct?

23 A For the most part, yes.

24 Q Yeah. And those claims also did not have future claims  
25 issues, correct?

1 A I don't think I would characterize it that way. There was  
2 a future claims problem there. There was not a latency  
3 problem. But one of the big concerns in opioids was if you  
4 settle with some municipalities, other municipalities may bring  
5 claims in the future. And so the opioid settlements were  
6 designed to disincentivize lawyers from taking on the claims of  
7 other municipalities in the future.

8 Q All right. And then I think lastly, when we were talking  
9 about the settlements in the MDL context and the ability to --  
10 their dependency on whether folks can opt out, the dependency,  
11 they rely on an opt-in model. You've agreed that the MDL court  
12 cannot bind parties to opt in, correct?

13 A Correct.

14 Q Cannot prevent parties from opting out.

15 A Correct.

16 Q And you have no basis, as you sit here today, to opine on  
17 the extent to which parties in the talc litigation would opt in  
18 or opt out to any settlement as you sit here today.

19 A I don't have a crystal ball. I can't tell you how the  
20 talc litigation would be resolved. I think the tools are there  
21 to do it. It may take some creative lawyering to get it done,  
22 but probably not as much creativity as the Texas two-step.

23 MR. GORDON: Move to strike.

24 THE COURT: Sustained, even if (indiscernible).

25 (Laughter)

1 MS. O'CONNOR: Thank you, Professor Rave.

2 MR. SILVERSTEIN: No further questions, Your  
3 Honor.

4 THE COURT: Thank you, Professor, for your time  
5 today.

6 THE WITNESS: Thank you, Judge.

7 MR. SILVERSTEIN: Your Honor, Adam Silverstein again  
8 from Otterbourg. At this point, the TCC calls as an expert  
9 witness Mr. Royal Ferguson.

10 THE COURT: Good morning, Judge. How are you?

11 JUDGE FERGUSON: Fine, Your Honor. Thank you.

12 MR. SILVERSTEIN: Your Honor, again, while -- should  
13 we wait for the witness to swear in before we hand out  
14 additional binders?

15 THE COURT: You get your binders ready, I'll swear  
16 him in.

17 ROYAL FERGUSON, TCC'S WITNESS, SWORN

18 THE COURT: Thank you, Judge. Have a seat. And just  
19 for anybody's benefit, I don't have an issue with referring to  
20 the witness as Judge.

21 MR. SILVERSTEIN: I'm going to try at Mr. Ferguson's  
22 request to refer to him as Mr. Ferguson, but I wan switch.  
23 It's not easy.

24 THE COURT: However you're comfortable.

25 THE WITNESS: Thank you, sir.

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1 DIRECT EXAMINATION

2 BY MR. SILVERSTEIN:

3 Q Mr. Ferguson, good morning. You have in front of you a  
4 binder with one tab. And behind that tab is Exhibit 980.  
5 Would you please identify for the Court what Exhibit 980 is?

6 A It's my expert report.

7 Q And do you understand that your expert report is being  
8 offered in court today as if it were your live testimony on  
9 direct under oath?

10 A I do.

11 MR. SILVERSTEIN: Your Honor, at this point we offer  
12 into evidence Exhibit 980.

13 THE COURT: Any objection?

14 MS. O'CONNOR: No objection.

15 THE COURT: All right. It will be admitted. Thank  
16 you.

17 (TCC's Exhibit 980 admitted into evidence)

18 CROSS-EXAMINATION

19 BY MS. O'CONNOR:

20 Q Good morning, Judge Ferguson.

21 A Good morning, Ms. O'Connor. How are you today?

22 Q Good, thanks.

23 A Great.

24 Q When you served on the district court in the Western and  
25 Northern Districts of Texas, you had only one MDL case assigned

1 to you, correct?

2 A That's correct.

3 Q And that case was a class action that settled fairly  
4 shortly after it started, and was not tried, correct?

5 A That's correct.

6 Q In your time as a practitioner before your service on the  
7 bench, you never represented a party in MDL litigation. Is  
8 that correct?

9 A That's correct.

10 Q And you've never represented a party or been involved with  
11 efforts to settle MDL litigation.

12 A That's correct.

13 Q Judge Ferguson, you agree that your expert report does not  
14 discuss the talc litigation, right?

15 A Correct.

16 Q And you don't talk about the talc cases in your report  
17 because you're not familiar with the talc cases, right?

18 A Right.

19 Q And indeed, you've admitted that you don't know anything  
20 about the talc litigation, right?

21 A Right.

22 Q And your expert report also does not address LTL  
23 Management or the prospect of its restructuring. Is that  
24 right?

25 A Right.

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1 MS. O'CONNOR: Okay. Thank you, Judge Ferguson.  
2 That's all I have.

3 REDIRECT EXAMINATION

4 BY MR. SILVERSTEIN:

5 Q Good morning again, Mr. Ferguson.

6 A Good morning.

7 Q Why did you not address the talc litigation in your expert  
8 report?

9 A I wasn't asked to do so.

10 Q And what were you asked to do?

11 A I was asked to talk about the MDL process under the  
12 statute 28 U.S. Code Section 1407.

13 Q And could you briefly describe your background and your  
14 source of knowledge for giving opinions on the MDL system under  
15 Section 1407?

16 A Well, I grew up in Lubbock, Texas, went to Texas Tech. I  
17 had to deal with the draft, so I was an ROTC grad. Went to law  
18 school at Austin. Then I had a two-year commitment to the  
19 Army, first year in Aberdeen Proving Ground, second year in  
20 Vietnam where I tell people I carried a typewriter so they knew  
21 that I wasn't carrying a rifle.

22 Then clerked for a federal judge. Then spent 24 years  
23 trying cases in El Paso, Texas. Then was appointed to the  
24 bench in 1994. In 2008, I became a member of the Judicial  
25 Panel for Multidistrict Litigation. I retired from the bench

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1 in 2013.

2 And in an interesting move, I became a dean of the newest  
3 public law school in Texas. I did that for five years. We got  
4 provisional accreditation. And then I retired. And now I  
5 practice law with my wife.

6 Q Were you asked to offer an opinion, and do you offer an  
7 opinion on a policy debate as to which court, bankruptcy or  
8 courts in the tort system, are superior for resolving mass tort  
9 disputes?

10 A I wasn't asked to do that. I have never understood that  
11 in the real world, that's a debate that we're having. I think  
12 it's pretty clear how the law works in these areas. So I  
13 didn't understand a debate was occurring, at least in the real  
14 world.

15 Q Okay. Have you read the Third Circuit's opinion rendered  
16 earlier this year in this case?

17 A I read Judge Ambro's opinion, yes.

18 Q And did you see the Court's discussion of concerns about  
19 redefining fundamental rights of claimants that may arise when  
20 a bankruptcy is filed prematurely?

21 A I read that. Judge Ambro said that we should not disturb  
22 those fundamental rights except under other circumstances. And  
23 that other circumstance was he was talking about the financial  
24 distress of a company and its ability to go into bankruptcy.

25 MS. O'CONNOR: Objection, Your Honor. I think I

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1 established on cross that Judge Ferguson did not discuss this  
2 case in his report. It was generally about the MDL process and  
3 not at all about this case.

4 MR. SILVERSTEIN: I was going to use it as a segue to  
5 the next question about the MDL, Your Honor.

6 THE COURT: All right. It will be -- I'll strike  
7 that portion. Thank you.

8 BY MR. SILVERSTEIN:

9 Q Judge Ferguson, Mr. Ferguson, how does the JPML and MDL  
10 process deal with the concerns expressed by the Third Circuit  
11 in the decision rendered in January in carrying out Congress'  
12 intent in Section 1407 to promote just and efficient conduct of  
13 the litigations in the MDL?

14 MS. O'CONNOR: Objection, Your Honor, on the same  
15 basis.

16 THE COURT: If we took out the sentence addressing  
17 the concerns of the Third Circuit and just --

18 MR. SILVERSTEIN: How --

19 THE COURT: -- continue with the question.

20 THE WITNESS: Yes, sir.

21 BY MR. SILVERSTEIN:

22 Q How does the JPML and MDL process carry out the mandate by  
23 Congress in Section 1407 in promoting the just and efficient  
24 conduct of actions?

25 A We'll start at the beginning. The statute was passed in

1 1968. The district conference wanted a statute, not a rule.  
2 As you know, class action rule came a little bit earlier, and  
3 it was made to be a rule. But the conference wanted a law, a  
4 statute. And so after lots of effort, 1407 was passed by  
5 Congress.

6 It was then law writ large as you might say. It  
7 anticipated this growth of mass torts in our system. It  
8 created a judicial panel for multidistrict litigation, seven  
9 judges from different circuits. And their job was to take  
10 cases pending in multiple courts and centralize them for the, I  
11 think the statute said for the just and efficient resolution of  
12 those cases.

13 And so that was the beginning. Over time, the JPML slowly  
14 but surely began to develop programs where they would appoint,  
15 they would centralize cases, appoint transferee judges into  
16 those cases. And over time, the whole process grew.

17 The job of the JPML is really two elements. One, to  
18 centralize the case. If there should be a case brought into  
19 one transferee court, the JPML makes that decision. And then  
20 its second decision is to choose the transferee judge. A very  
21 important decision because it's a very important job that that  
22 transferee judge will have because that judge will have to  
23 handle that case along with their other docket.

24 And so it's, as I say, a very careful decision. And  
25 fortunately, the federal courts have a deep bench, and we have

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1 really outstanding judges to handle these very difficult cases.

2 After that's done it goes to the transferee judge. And

3 there, the transferee judge must get the case organized.

4 Really, the first thing the transferee judge is to organize the

5 lawyers. You don't have to do much organization on the defense

6 side because the defendants already have their lawyers, and

7 they are organized.

8 But on the plaintiffs' side, there's a need for

9 organization. And so the judge normally assembles a plaintiff

10 steering committee. And that plaintiff steering committee is

11 normally composed of outstanding lawyers because they have to

12 be outstanding because the lawyers on the other side are

13 outstanding.

14 And with that kind of basic foundation, the case can

15 start. We know that only federal cases go into the

16 multidistrict litigation under 1407. And so the judge will

17 find out whether there's state cases. If there are state

18 cases, the judge will reach out to those state judges to try to

19 see if there could be coordination so that there can be a very

20 thoughtful way of proceeding.

21 Then we just use the rules of civil procedure in a

22 creative way. First we've got to make sure that these claims

23 are sufficient or accurate. So there's normally plaintiffs,

24 excuse my voice. There are normally plaintiffs fact sheets

25 prepared. We've got to organize all the documents. There's

1 normally a document depository prepared.

2 That's normally coordinated with the state courts if there  
3 are state cases. From there, we need to make sure that the  
4 witnesses aren't deposed over and over again. So that's  
5 coordinated, again often with state judges.

6 You've got all the problems with the science and with the  
7 experts. And that has to be dealt with. That's very important  
8 because sometimes in cases, the courts find that the experts  
9 are insufficient. The cases for the plaintiffs basically go  
10 away because the science does not support the case.

11 After all that's done, then normally the court will set up  
12 bellwether trials. Those are trials by jury, and except in the  
13 Deepwater Horizon case because it was an admiralty, those cases  
14 weren't by jury. But normally, they're jury trials.

15 And we've used jury trials forever to assess cases, to  
16 assess the value of cases. You know, I started trying  
17 insurance intersection collision cases with juries, and that's  
18 the way we would assess the value of those cases. And that's  
19 still the way to assess value of cases.

20 And so the bellwether trials I think are very important.  
21 They're also important because it implicates the 7th Amendment.  
22 And the 7th Amendment, of course, is fundamental to the way  
23 that we make sure there is the just resolution of cases.

24 And then from there, the parties begin the settlement  
25 process. When I was serving on the Judicial Panel for

1 Multidistrict Litigation, we really never thought much about  
2 settlement. We thought about getting the cases organized under  
3 a transferee judge. And we knew that cases almost always  
4 settle.

5 There's always some kind of resolution. And so the real  
6 concern we had was to make sure that organization occurred, and  
7 that these cases were being handled in a fair and efficient way  
8 for the litigants.

9 Q And --

10 MS. O'CONNOR: Your Honor, sorry to -- I just wanted  
11 to mention that most of the -- all of this is in his report  
12 which has been submitted to Your Honor and admitted. And my  
13 understanding was that that was going to be the process, then  
14 we had cross, and this would be redirect. So I just mention  
15 that for our time purposes.

16 MR. SILVERSTEIN: Yeah. I have one or two more  
17 questions.

18 THE COURT: All right. Well, proceed. Thank you.  
19 BY MR. SILVERSTEIN:

20 Q Was the MDL process designed, and is it implemented as a  
21 plaintiffs process?

22 A Not at all. I mean, our system is built on fairness,  
23 beginning and ending built on fairness. It's going to be fair  
24 to both sides. It's always, in my view, always fair to both  
25 sides. And there are many instances in the MDL process where

1 defendants are dismissed, taken out of the case because there's  
2 not a cause of action really stated against them. Our system  
3 is fair to both sides, always.

4 MR. SILVERSTEIN: Your Honor, I have no further  
5 questions. Thank you.

6 THE COURT: Any recross?

7 MS. O'CONNOR: No, Your Honor.

8 THE COURT: Judge Ferguson, thank you for your time.

9 THE WITNESS: Thank you, sir.

10 THE COURT: All right. Wendy, how are you doing?  
11 Need a break? We'll take a five, ten-minute break.

12 Who's next? Who will be --

13 MS. O'CONNOR: Your Honor, we'll be calling Sheila  
14 Birnbaum.

15 THE COURT: Okay.

16 MR. SILVERSTEIN: Thank you, Your Honor.

17 THE COURT: We'll start up by 10:30. Thank you.

18 (Recess at 10:20 a.m./Reconvene at 10:31 a.m.)

19 THE COURT: Good morning.

20 MS. BIRNBAUM: Good morning, Your Honor.

21 SHEILA BIRNBAUM, DEBTOR'S WITNESS, SWORN

22 THE COURT: Please have a seat.

23 THE WITNESS: Thank you.

24 THE COURT: And when you're set up, please give your  
25 name and business address for the record.

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1 THE WITNESS: Sheila Birnbaum, 3 Bryant Park, New  
2 York City, New York.

3 THE COURT: Clearly New York.

4 MS. O'CONNOR: I'm sorry, one moment.

5 THE COURT: No problem.

6 MS. O'CONNOR: I'm just going to hand these out. I'm  
7 going to hand these out.

8 THE COURT: Thank you.

9 THE WITNESS: Thank you.

10 DIRECT EXAMINATION

11 BY MS. O'CONNOR:

12 Q Good morning, Ms. Birnbaum.

13 A Still morning? Still morning?

14 Q How are you?

15 A Very well, thanks.

16 Q Did you submit a rebuttal expert report in this case?

17 A I did.

18 Q And do you understand that by the parties' agreement, your  
19 rebuttal expert report is being offered into evidence in lieu  
20 of your live direct testimony?

21 A I do.

22 Q And do you have a copy of your rebuttal expert report  
23 there in front of you?

24 A I do.

25 Q And would you please confirm that the document you're

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1 holding is indeed your rebuttal expert report?

2 A It is.

3 Q Does that rebuttal expert report contain the opinions you  
4 intend to offer in this case as if you presented those opinions  
5 live during your testimony here in the courtroom today?

6 A Yes.

7 Q Would you please read for the record the exhibit sticker  
8 on the first page of the rebuttal expert report?

9 A D-68.

10 MS. O'CONNOR: All right. Thank you, Ms. Birnbaum.

11 Your Honor, at this point, we offer Ms. Sheila  
12 Birnbaum's rebuttal expert report marked as Exhibit D-68 into  
13 the record.

14 THE COURT: All right.

15 MR. SILVERSTEIN: No objection from the TCC.

16 THE COURT: Thank you. Then D-68 is admitted.

17 (Debtor's Exhibit D-68 admitted into evidence)

18 MR. SILVERSTEIN: Your Honor, with apologies to the  
19 environment in advance, can we hand out some additional  
20 binders?

21 THE COURT: Thank you.

22 THE WITNESS: Thank you.

23 CROSS EXAMINATION

24 BY MR. SILVERSTEIN:

25 Q Good morning, Ms. Birnbaum.

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1 A Good morning.

2 Q You are a products liability mass tort defense attorney.

3 A I am.

4 Q And you have been a products liability and mass tort  
5 defense attorney for the past more than 55 years.

6 A That's a long time.

7 Q You have not represented a plaintiff in a product  
8 liability case in some 40-odd years.

9 A That's probably true.

10 Q You were a chair of Skadden product liability and mass  
11 tort group from 1985 through 2013.

12 A Yes.

13 Q For nearly 30 years?

14 A Yes.

15 Q You were co-chair of Quinn Emanuel's global product  
16 liability and mass tort practice from 2013 through 2018.

17 A Yes.

18 Q And since 2018, you have been co-chair of Dechert's  
19 product liability and mass tort practice.

20 A Yes.

21 Q And because of your decades of experience with products  
22 liability and mass tort defense, you have been called the queen  
23 of toxic torts.

24 A Some mass tort people have called me that.

25 Q Johnson & Johnson is a client of your law firm, Dechert.

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1 A From time to time, yes.

2 Q Well, Kimberly Branscome, one of your co-chairs of the  
3 products liability and mass tort practice at Dechert, has tried  
4 talcum powder cases on behalf of Johnson & Johnson, true?

5 A Before she was a partner at Dechert, when she was at  
6 Kirland.

7 Q And she's -- is it your testimony that she no longer  
8 represents Johnson & Johnson?

9 A No. I didn't say that.

10 Q Okay. So she represents Johnson & Johnson currently. And  
11 prior to the 2021 bankruptcy filing, she had tried talc cases  
12 on behalf of Johnson & Johnson, true?

13 A I don't know how many talc -- I think she tried one case,  
14 but I'm not sure. I have no idea.

15 Q And Dechert touts on its website the fact that Ms.  
16 Branscome and her team have achieved defense verdicts in talc  
17 cases, true?

18 A I would assume so.

19 Q The Dechert's website also touts that its healthcare group  
20 won the 2015 healthcare collaboration deal of the year for  
21 Johnson & Johnson and its subsidiary, Ethicon, right?

22 A If it's there, then that's true.

23 Q And we looked at that at your deposition.

24 A Yes, we did.

25 Q Okay. And you don't dispute that that's on Dechert's

1 website, and that it's accurate.

2 A No.

3 Q And Dechert's crisis management practice of which you are  
4 a member touts on Dechert's website that when it had a high  
5 profile event that threatened to irrevocably damage its brand,  
6 Johnson & Johnson turned to Dechert to lead it through that  
7 crisis, true?

8 A I don't know what time, period of time that was related  
9 to. But it's on the website.

10 Q In fact, you were approached as serving as an expert in  
11 this case by the National Coordinating Counsel for Johnson &  
12 Johnson's talc docket, Kristen Fornier of King & Spaulding.

13 A Yes.

14 Q Now, you are not a bankruptcy lawyer, correct?

15 A I am not.

16 Q In fact, it's fair to say there is no area of bankruptcy  
17 that you consider yourself to be an expert in.

18 A That's true.

19 Q And yet it's your expert opinion in this case that this  
20 bankruptcy court in New Jersey is a better forum within which  
21 it resolve LTL's talc claims than the MDL in district court.

22 A Yes.

23 Q And that's because in your opinion, in bankruptcy,  
24 resolution can be done comprehensively, fairly, and equitably.

25 A Yes.

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1 Q But although you hold that opinion, you're not opining on  
2 any bankruptcy issues in this case, right?

3 A That's true.

4 Q Okay. Now, you don't believe that bankruptcy was a  
5 superior form within which to resolve LTL's talc liabilities in  
6 2016 when the MDL was formed, correct?

7 A I have no opinion on that.

8 Q And in fact, there's no point in time when you can say one  
9 forum was or is superior to another for resolving talcs, LTL's  
10 talc claims, true?

11 A When I talk about a point in time, we're talking about  
12 where the better mechanisms rest to try to resolve future and  
13 latent talc claims.

14 Q And there's no point in time that you can say when  
15 bankruptcy became a better forum for resolving talc claims than  
16 the MDL system.

17 A It just generally, it's a better forum.

18 Q So you can't say, and you're not offering the opinion  
19 whether bankruptcy was a superior forum within which to resolve  
20 LTL's talc liabilities in 2016, 2017, 2018, and so on up until  
21 the point that LTL filed for bankruptcy on October 14th --

22 A I'm not.

23 Q -- 2021. Correct?

24 A Yes.

25 Q And so it follows from that that you don't disagree that

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1 up until the moment that LTL filed for bankruptcy for the first  
2 time on October 14th, 2021, the MDL was as good if not better a  
3 forum to resolve LTL's talc liabilities than bankruptcy was.

4 A No, I don't agree with that.

5 Q Well, if you don't have an opinion as to when bankruptcy  
6 became a superior forum, doesn't it follow that you don't have  
7 an opinion as to whether the MDL was as good, if not better  
8 than bankruptcy at any point up to the bankruptcy filing?

9 A No, because generally latent claims like this with future  
10 unknown claimants cannot be readily resolved in MDLs, and have  
11 not been.

12 Q But with regard to this specific mass tort of LTL's talc  
13 liabilities, you don't have an opinion as to whether at any  
14 point in time up to the filing of LTL's bankruptcy on October  
15 14th, 2021, whether it was superior to resolve those claims in  
16 one forum or another, true?

17 A I do have an opinion. My opinion is it would always, in  
18 this situation that we are confronted with, with so many  
19 potential future claimants and latent injuries, the MDL is not  
20 a forum that can get resolution.

21 Q Ms. Birnbaum, in the black binder, in Tab 1 is your  
22 deposition.

23 A Tab 1?

24 Q Yes.

25 MS. O'CONNOR: What page are we heading to?

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1 MR. SILVERSTEIN: Page 120.

2 THE WITNESS: Yes.

3 BY MR. SILVERSTEIN:

4 Q All right. And, Ms. Birnbaum, at your deposition, I asked  
5 you: "Is it your opinion that a bankruptcy court's ability to  
6 centralize all claims to approve procedures and accelerate the  
7 process by which claims are valued and compensated and to  
8 account for and protect and bind future claimants makes it a  
9 superior forum in which to resolve LTL's talc claims?"

10 And you answered: "Yes."

11 And then I asked: "Was bankruptcy a superior forum in  
12 which to resolve LTL's talc claims in 2016 after the MDL was  
13 formed?"

14 You asked me to repeat the question, which I did. And you  
15 said: "Probably not. Not immediately, until there was lots  
16 more information." True?

17 A That's true.

18 Q Okay. And at page 129, at line 11, I asked you --

19 MS. O'CONNOR: Just a second. Can I get there,  
20 please.

21 BY MR. SILVERSTEIN:

22 Q "Do you have an opinion on whether LTL should have filed  
23 for bankruptcy and availed itself of the" --

24 MS. O'CONNOR: Objection, Your Honor. This is not  
25 impeachment anymore. This is consistent with her testimony.

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1 THE COURT: The portion coming up --

2 MS. O'CONNOR: Yeah.

3 THE COURT: -- on 129?

4 MS. O'CONNOR: Yeah. Yes, Your Honor.

5 THE COURT: Let me hear the question.

6 BY MR. SILVERSTEIN:

7 Q "Do you have an opinion on whether LTL should have filed  
8 for bankruptcy and availed itself of the tools of bankruptcy  
9 court earlier than October 14, 2021?"

10 "I have no opinion."

11 THE COURT: I'm going to overrule the objection.

12 BY MR. SILVERSTEIN:

13 Q You were asked that question, and you have that answer,  
14 correct?

15 A That's correct.

16 Q Now, Ms. Birnbaum, you agree that as far as Johnson &  
17 Johnson is concerned, had Johnson & Johnson won the Daubert  
18 motion in the MDL, precluding the plaintiff's causation

19 experts, in that case the MDL would have been the more

20 efficient forum for Johnson & Johnson than bankruptcy, true?

21 A I don't know what you mean by efficient there. It would  
22 certainly be a great result and a better forum --

23 Q And it would have --

24 A -- at that point, because the case would be dismissed.

25 Q And all the claims would have been resolved at that point?

1 A That's right.

2 Q So in the case of a granting of the Daubert motion, MDL  
3 was the more efficient forum for J&J to resolve all of its  
4 liabilities, true?

5 A I wouldn't use the word "efficient." It would certainly  
6 be the better forum.

7 Q And it would have gotten to that result of resolving all  
8 claims faster, because that would have happened in 2020?

9 A Absolutely.

10 Q Okay. Now, it's your opinion that today a bankruptcy  
11 court's ability to centralize all claims to approve procedures  
12 and accelerate the process by which claims are valued and  
13 compensated and to account for and protect and bind future  
14 claimants makes it a superior forum in which to resolve LTL's  
15 talc claims, right?

16 A Yes.

17 Q But that's your opinion only if LTL is eligible to be in  
18 bankruptcy, right?

19 A Yes.

20 Q And you agree that bankruptcy tools like centralization,  
21 automatic stay, bar date, and estimation don't render  
22 bankruptcy a superior forum to MDL in all mass torts, right?

23 A Yes.

24 Q Because not all mass torts require the use of all of these  
25 tools?

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1 A Yes.

2 Q And so you agree that there are certain circumstances  
3 under which resolving mass tort claims in bankruptcy is not  
4 necessarily superior to resolving them in an MDL?

5 A Absolutely.

6 Q And so it's the existence of latencies and future claims  
7 that, in your opinion, render bankruptcy a superior forum to  
8 resolve the mass tort disputes like talc, right?

9 A Yes.

10 Q Now, one of the principal reasons you believe bankruptcy  
11 is superior to the MDL process for resolving the talc claims is  
12 because bankruptcy can force all claimants into a settlement  
13 without opt-outs, true?

14 A Yes.

15 Q And in other words, talc claimants can be bound by a  
16 resolution in bankruptcy whether they vote for it or not?

17 A Well, there had to be a vote -- there would certainly have  
18 to be a vote in the bankruptcy to get a plan of reorganization.

19 Q But claimants who don't vote or who oppose the plan can be  
20 bound by the resolution even if they disagree with it. That's  
21 one of the reasons why you believe bankruptcy is superior?

22 A Yes.

23 Q And as to those claimants who are -- or who would be bound  
24 by a settlement in a bankruptcy that are not in favor of it,  
25 you did not take into account that their fundamental rights

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1 would be redefined in bankruptcy in that circumstance, did you?

2 A Every settlement redefines fundamental rights in the sense  
3 that people give up a right to continue the litigation and to  
4 try the cases.

5 Q And now I'm talking about claimants who opposed the  
6 settlement. You did not take into account for those claimants  
7 who would oppose a resolution in bankruptcy the fact that their  
8 fundamental rights in bankruptcy would be redefined in  
9 determining that bankruptcy is a superior forum, true?

10 A I did consider that, yes.

11 Q Well, you testified that --

12 MS. O'CONNOR: Objection.

13 MR. SILVERSTEIN: All right. I'll withdraw it.

14 BY MR. SILVERSTEIN:

15 Q The fact that claimants bound by a bankruptcy resolution  
16 who oppose that resolution are forfeiting their fundamental  
17 right to a jury trial merits no weight in your analysis,  
18 because, in your words, the right to a jury trial is ephemeral,  
19 true?

20 A In most instances, the answer to that is yes. Most cases  
21 do not get tried in the civil system. Most cases do not get  
22 tried in the MDL system.

23 Q And so there wasn't a lot of weight that you based on the  
24 fact that resolving talc and powder liabilities through this  
25 bankruptcy will impair claimants' right to prove to a jury of

1 their peers injuries they claim to be caused by the talcum  
2 powder, true?

3

4 A True.

5 Q Because the seventh amendment right to a jury trial is  
6 ephemeral in your view, true?

7 A It's not ephemeral. It's not usually in any of these mass  
8 torts something that most people or few people ever try any of  
9 these cases in any MDL. You have a couple of bellwether trials  
10 that get done, maybe 6, 12, whatever. And nobody else tries  
11 their cases.

12 Q And so, Ms. Birnbaum, will you agree that at your  
13 deposition you testified repeatedly that the right to a jury  
14 trial is ephemeral, using that specific word?

15 A In settlements, yes.

16 Q Would you agree that you referred to the jury trial right  
17 as ephemeral? Those were your words?

18 A No. It's a right that everybody can have, has, and should  
19 have. But in reality, there are very few cases tried in MDLs  
20 or in the civil system.

21 Q Now, you're not testifying that the MDL process is not  
22 capable of achieving a comprehensive resolution and closure of  
23 mass tort disputes involving future claimants and long latency  
24 periods, correct?

25 A Well, I don't know what you mean by capable --

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1 Q Well --

2 A -- in that respect. Can it be done at all? Under these  
3 circumstances, I would doubt it. You cannot use a class action  
4 to get these cases settled since Amchem and Ortiz.

5 Q Ms. Birnbaum, I'm going to refer you back to tab 1 and ask  
6 you to turn to page 59.

7 A To what page, sir?

8 Q 59 at line 24. Do you recall that I asked you: "Are MDLs  
9 capable of achieving comprehensive resolution and closure of  
10 mass tort disputes involving future claimants and long latency  
11 periods?"

12 Answer: "I don't think you can describe it that way of  
13 MDLs as not capable. MDL is a process. It's a gathering  
14 together of cases in one federal forum. It doesn't include  
15 state cases. It may exclude other kind of cases. So I  
16 wouldn't talk -- I wouldn't use the language as you're using  
17 it. It's a process. It's a procedure of bringing cases  
18 together for pretrial purposes."

19 And then I asked you at line 16 on page 60: "Are parties  
20 capable through the MDL process of achieving comprehensive  
21 resolution and closure of mass tort disputes involving future  
22 claimants and long latency periods in your opinion?"

23 MS. O'CONNOR: Objection, Your Honor. Again, this is  
24 not an impeachment. This is exactly consistent with what she  
25 just testified to. She --

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1 MS. SILVERSTEIN: Well --

2 MS. O'CONNOR: -- said literally, again, I'm not sure  
3 what you mean by capable --

4 THE COURT: It --

5 MS. O'CONNOR: -- this is exactly consistent with --

6 MR. SILVERSTEIN: And --

7 MS. O'CONNOR: -- her testimony today.

8 MR. SILVERSTEIN: And then it continues, Your Honor.

9 MS. O'CONNOR: Well, she --

10 MR. SILVERSTEIN: Can --

11 MS. O'CONNOR: He's reading through paragraphs.

12 MR. SILVERSTEIN: "Can a settlement be done that has  
13 latency in it?"

14 MS. O'CONNOR: Well --

15 MR. SILVERSTEIN: I (sic) answered: "Yes, it could.  
16 It may be able to be done, but it has not been accomplished  
17 very well in the situations where it has come up since --

18 THE COURT: Let me --

19 MR. SILVERSTEIN: -- Amchem and Ortiz."

20 THE COURT: Let me rule on the objection. There are  
21 many elements that are consistent with her testimony. The  
22 wording may be different. I'm just going to allow her to --  
23 I'm going to allow him to ask -- allow the -- to ask the  
24 question to clarify it.

25 BY MR. SILVERSTEIN:

1 Q Ms. Birnbaum, when I asked you: "Are parties capable  
2 through the MDL process of achieving comprehensive resolution  
3 and closure of mass tort disputes involving future claimants  
4 and long latency periods, in your opinion," you answered: "I'm  
5 not sure what you mean by capable."

6 But then you went on to say: "Can a settlement be done  
7 that has latency in it? It could. It may be able to be done.  
8 But it has not been accomplished very well in the situations  
9 where it has come up since Amchem and Ortiz."

10 A That's a --

11 Q That's your -- that was your testimony then?

12 A It's my testimony then. It's my testimony now.

13 Q Okay. So the parties are capable of achieving a  
14 comprehensive resolution in the MDL of a mass tort dispute  
15 involving long latencies and future claims?

16 A No. Not since Amchem or Ortiz. There have been none.  
17 You cannot point to one class action settlement that has  
18 handled and resolved future claimants such as those here and  
19 latent injuries. And the only exception was NFL, which is a  
20 very different case.

21 Q So when you testified that it could be done but it's not  
22 done very well after Amchem and Ortiz, you were incorrect then?

23 A No.

24 Q Okay.

25 A It's -- I'm saying the same thing.

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1 Q It can be done?

2 A It can't -- can be done but not in light of Amchem and  
3 Ortiz. So it can't be done through a settlement class. There  
4 have been no settlement classes since Amchem or Ortiz since  
5 1998 and 1999. If we could do it, we'd be doing it.

6 Q Well, let me --

7 A It is a lot easier to do a settlement class than --  
8 there -- after Amchem and Ortiz, most academics and  
9 practitioners agreed that class action settlements in these  
10 types of situations of personal injury cases were the death  
11 knell. And there have been none.

12 Q Well, let me ask it this way, Ms. Birnbaum. Am I right  
13 that you're -- you are not testifying that bankruptcy is the  
14 only forum within which to resolve talcum powder liabilities?

15 A I am not.

16 Q You are not? Bankruptcy is not the only forum within  
17 which to resolve the talcum --

18 A I --

19 Q -- powder liabilities, correct?

20 A Let me go back. It is the only forum that likely can be  
21 done, because there is no mechanism that we know of that can  
22 get it done otherwise, because the class action settlement has  
23 not been done since Amchem or Ortiz. And believe me, if it  
24 could have been done, there are lots of really, really smart  
25 people that could have made it happen. That's 20 -- that's

1 decades we're talking about now.

2 Q Ms. Birnbaum, back to your deposition at 108, line 25.

3 A 108?

4 Q Yeah. I apologize. 110.

5 A 110? Got it.

6 Q Line 21. Ms. Birnbaum, I asked you: "So am I right,  
7 Ms. Birnbaum, that your opinion is not that bankruptcy is a  
8 superior forum within which to resolve the talcum powder  
9 liabilities, but it's the only forum within which to resolve  
10 the talcum powder liabilities?"

11 And your answer was: "I'm not suggesting it's the only  
12 forum. It's certainly the superior forum, but I haven't seen a  
13 case like that settled where -- in such latency through the MDL  
14 except for NFL, which as I said is very different."

15 Your testimony is it's superior, but it's not the only  
16 forum within which to resolve these liabilities, correct?

17 A It's the superior forum.

18 Q Okay. That's your opinion, that it's the superior forum?

19 A Yes.

20 Q But you would agree that it's not the only forum within  
21 which to resolve these liabilities?

22 A As I said before, there has been no cases that have  
23 settled these types of cases in the MDLs for the last decades.

24 Q Well, let me ask this, Ms. Birnbaum. If this case is  
25 dismissed, you don't know how many trials will result in the

1 tort system?

2 A I have no idea.

3 Q And in your view, nobody can determine how many trials  
4 there would be?

5 A Nope.

6 Q Correct?

7 A Yes.

8 Q And you have no basis to disagree with Professor Rave's  
9 statistic that 90 percent -- 97 percent of all MDL cases are  
10 resolved in the MDL chancery court without remand, true?

11 A No.

12 Q You have no basis --

13 A No, I have no -- I don't disagree with that.

14 Q And you don't dispute Professor Rave's statistic that over  
15 99 percent of all federal products liability cases are resolved  
16 without trial?

17 A No, I don't disagree.

18 Q You agree that very few cases ever get tried?

19 A Yes, I agree to that.

20 Q Now, you -- in your expert report at page 6, you state at  
21 the bottom that there are several examples of cases with  
22 latency issues that could not be settled in an MDL but had to  
23 be settled through the bankruptcy process?

24 A Yes.

25 Q And you're talking about asbestos companies like W.R.

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1 Grace and silicone breast companies like Dow Corning, true?

2 A Yes.

3 Q You're not giving the opinion that those examples filed  
4 for bankruptcy without having the requisite financial distress,  
5 are you?

6 A I am not.

7 Q And you agree that there are defendants in this -- the  
8 asbestos MDL that have managed their liability in the MDL  
9 without resort to bankruptcy, true?

10 A For administrative -- through administrative settlements  
11 where they pay certain amounts each year and work out their  
12 arrangements with plaintiff's lawyers. They have the smaller  
13 defendants, not any of the larger defendants who are all in  
14 bankruptcy.

15 Q Similar to a bankruptcy trust?

16 A It's not really a trust. It's --

17 Q All right. But the --

18 A But it's an administrative process.

19 Q Okay. And are you aware of how trust distribution  
20 procedures operate?

21 A Not -- just generally.

22 Q Okay. And there are defendants in silicone breast  
23 implants -- the silicone breast implants MDL other than Dow  
24 Corning that have resolved their liability with resorting to  
25 bankruptcy, true?

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1 A Yes. They were not the prime defendants. They had  
2 different relationships with the product. The prime defendant  
3 was Dow Corning.

4 Q There are companies that settled opioids exposure in the  
5 MDL without resorting to bankruptcy, true?

6 A Yes. But those are not personal injury or latency cases.

7 Q You're aware that Johnson & Johnson resolved its opioids  
8 exposure in the MDL without resort to bankruptcy, true?

9 A Yes, because it's not a personal injury latency case.

10 MR. SILVERSTEIN: No further questions. Thank you.

11 THE WITNESS: Thank you.

12 MR. MAIMON: May I, Your Honor?

13 THE COURT: Thank you.

14 Mr. Maimon?

15 MR. MAIMON: Thank you.

16 CROSS-EXAMINATION

17 BY MR. MAIMON:

18 Q Good morning, Ms. Birnbaum. My name is Moshe Maimon. We  
19 haven't had the pleasure of meeting. Today, I only have a few  
20 questions for you.

21 A Okay.

22 Q The lawyers who retained you from Johnson & Johnson, did  
23 they tell you that in 2020 they stood in front of the Imerys  
24 bankruptcy court and told that court that the tort system was  
25 the proper place to revolve -- resolve its liability?

1 A They did not.

2 Q They did not tell you that?

3 A No.

4 Q Okay. We talked -- you talked a little bit about the  
5 seventh amendment right to a jury trial. You'll agree that  
6 that right is in the constitution, correct?

7 A Absolutely.

8 Q And you'll agree with me, won't you, that that right is  
9 also in the constitutions of the 50 states?

10 A Yes.

11 Q Do you -- the right to vote is in the constitution,  
12 correct?

13 A Thank God. Yes.

14 Q If you -- thank God. Yes. And if most people don't vote,  
15 can we take it away?

16 A No, we don't.

17 Q Okay. Good. Can you tell me where in the Constitution of  
18 the United States or in any constitution of any state it says  
19 that a company has a right to a global resolution of its  
20 liabilities?

21 A There's no such thing.

22 MR. MAIMON: Thank you so much.

23 MR. THOMPSON: Your Honor, briefly. Thank you.

24 THE COURT: Good morning, Mr. Thompson.

25 MR. THOMPSON: Clay Thompson, Maune Raichle.

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1 CROSS-EXAMINATION

2 BY MR. THOMPSON:

3 Q I always let Mr. Maimon go first, because he does a better  
4 job and covers what I --

5 A I'm sure you'll do a great job too.

6 MR. MAIMON: I'm older.

7 MR. THOMPSON: That's true.

8 BY MR. THOMPSON:

9 Q Good morning, ma'am. We've not met before either, I don't  
10 believe. You know that J&J filed a Daubert motion in the  
11 Imerys --

12 A I did not --

13 Q I'm sorry.

14 A I didn't follow that.

15 Q You know that J&J filed a Daubert motion in the MDL,  
16 correct?

17 A I assume so.

18 Q And --

19 A I didn't look into that very --

20 Q And you're aware that J&J in that instance liked the tort  
21 system, because they could challenge the legal and scientific  
22 theories of the plaintiffs in the MDL, right?

23 A Yes.

24 Q You cited Ortiz. That's a case you're familiar with,  
25 right?

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1 A Yes.

2 Q And you know that in footnote 23 of that what the Supreme  
3 Court noted was that: "It is no answer in this case that the  
4 settlement agreement provided for a limited back-end opt-out in  
5 the form of a right on the part of class members eventually to  
6 take their case to court is dissatisfied with the amount  
7 provided by the trust. The opt-out in this case requires  
8 claimants to exhaust a variety of alternative dispute  
9 mechanisms to bring suit against the trust and not against  
10 Fibreboard and it limits damages to \$500,000 to be paid out in  
11 installments over five to ten years despite multimillion dollar  
12 jury verdicts sometimes reached in asbestos suits."

13 You're familiar with that from Ortiz?

14 A I'm not. I don't have it in front of me. I'm sure it's  
15 in the case.

16 Q But it's a case that you referred to several times today,  
17 correct?

18 A Yes. It's one of the leading cases on class actions.

19 Q And have you seen the plan that's been proposed in this  
20 case --

21 A I have not.

22 MR. THOMPSON: Okay. Thank you.

23 THE COURT: Thank you, Mr. Thompson.

24 Anyone else?

25 Any redirect?

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1 MS. O'CONNOR: Yes, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. O'CONNOR:

4 Q Ms. Birnbaum, in your expert report, you address the  
5 effect of latent injuries on the ability to resolve mass torts.  
6 Can you please describe what effect latent injuries have on  
7 those efforts in your experience?

8 A The problem is it's impossible to identify who the  
9 plaintiffs are going to eventually be, because they have no  
10 injury at the moment, and their injury may manifest years after  
11 their exposure to a particular product, substance, or device.

12 Q How about the effect of unknown future claimants on the  
13 ability to resolve mass torts?

14 A That's a very big problem in the fact of due process.  
15 That is one of the reasons that settlements through class  
16 actions after Amchem and Ortiz just never continued because of  
17 the problems of a -- of notice, of due process, of having  
18 people understanding the ability to opt out or even know  
19 they've been exposed.

20 Q And in preparing your rebuttal expert report in this case,  
21 you considered a number of MDL case examples involving mass  
22 torts where settlement efforts were attempted. Is that  
23 correct?

24 A Yes.

25 Q And in preparing for your testimony today, did you assist

Birnbaum - Redirect/O'Connor

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1 in the preparation of a demonstrative that lays out those case  
2 examples that you considered?

3 A I did.

4 MS. O'CONNOR: If I could see demonstrative SB-1,  
5 please?

6 BY MS. O'CONNOR:

7 Q Is this the demonstrative that you prepared?

8 A Yes.

9 Q Okay. Can you please describe what this chart shows with  
10 respect to the cases you considered and discussed in your  
11 expert report?

12 A Yes. I looked at the issue of latent injuries and unknown  
13 future claimants and, in doing that, tried to determine where  
14 the cases were resolved. And I think this chart tries to show  
15 that. A lot of nice green and red. But that's -- this is an  
16 attempt to try to put it into a graphic.

17 Q Okay. And you mentioned the green and the red. So what  
18 are the takeaways in terms of your opinions from the green  
19 checkmarks versus the red Xs in the third column versus the  
20 first two columns with the green checkmarks?

21 A Okay. The closest paradigm to these talc cases are the  
22 asbestos cases. And they have latent injuries and unknown  
23 future claimants, and there have been 120 asbestos companies  
24 that have gone into bankruptcy to resolve their asbestos  
25 liabilities.

1 The Roundup case was spoken about before this. There was  
2 an attempt to settle a futures class, and that failed in part  
3 because of the fact of the inability to give notice which the  
4 judge talked about and the fact that it was not a sufficient  
5 amount.

6 The silicone breast implant cases was another case that  
7 was attempted to be a settlement class that also failed. And  
8 Dow Corning went into bankruptcy to resolve its latent injury  
9 and unknown future claims.

10 MS. O'CONNOR: Okay. And if I could see the next  
11 step in the --

12 BY MS. O'CONNOR:

13 Q Those three cases that you just discussed, those are shown  
14 in the yellow highlighted area there --

15 A Yes.

16 Q -- across the top? Let's walk through those three cases.  
17 The asbestos litigation. Why did you consider the asbestos  
18 litigation?

19 A Well, for many reasons. First of all, some of the  
20 plaintiffs here in this -- in the talc case say that there's  
21 asbestos in the talc products. So that would be a real close  
22 paradigm. Some of the plaintiffs here are trying to recover  
23 for mesothelioma, which is an asbestos signature disease. So  
24 that makes it a close contact as well. So I think those cases  
25 are really relevant in determining where is the best superior

1 methodology to get these kinds of latent unknown future claims  
2 resolved.

3 Q And what type of injuries were at issue in the asbestos  
4 cases?

5 A Mesothelioma, pleural plaques.

6 Q Mesothelioma like in the talc cases, correct?

7 A Right.

8 Q Were unknown future claimants involved in asbestos cases?

9 A Yes.

10 Q And was global resolution achieved in the asbestos cases?

11 A Yes. Not -- in the bankruptcies there was global  
12 resolution for many, many of the defendants.

13 Q Okay. So as it's broken out here in the demonstrative aid  
14 in the separate charts, global resolution in the context of the  
15 MDL is shown with a red X, correct?

16 A Yes.

17 Q But in the separate column for bankruptcy, there's a green  
18 check for bankruptcy, correct?

19 A Yes.

20 Q Now, and -- what -- and turning then to the Roundup case.  
21 What type of injuries were sustained in that case?

22 A Non-Hodgkin's Lymphoma.

23 Q And were latent injuries involved there?

24 A Yes. 10 to 15 years of latency.

25 Q Were unknown future claimants involved --

1 A Yes.

2 Q -- in Roundup? And was global -- has global resolution  
3 been achieved there?

4 A It has not. The settlement did not go through.

5 Q And what is happening with the Roundup litigation  
6 currently?

7 A The cases continue to be tried, settled.

8 Q All right. And then, finally, the silicone breast implant  
9 cases that you discussed in your report, what types of injuries  
10 were sustained in those cases?

11 A Those were autoimmune injuries as a result of the silicone  
12 breast implants.

13 Q Were there unknown future claimants involved in those  
14 cases?

15 A Yes.

16 Q And was global resolution achieved in the MDL in those  
17 cases?

18 A It was not. It failed.

19 Q Were there bankruptcies filed by defendants --

20 A Yes.

21 Q -- in those cases? Let's turn then to the case that  
22 Professor Rave focused on, the NFL concussion case.

23 MS. O'CONNOR: If I could see the next step in the  
24 demonstrative, please?

25 BY MS. O'CONNOR:

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1 Q The NFL concussion case, Ms. Birnbaum, how would you  
2 describe the type of injuries that were sustained in that case?

3 A Those were latent injuries. These were brain injuries,  
4 Parkinson's Disease, related brain injuries.

5 Q Was the group of future claimants in that case unknown?

6 A No. They were very much known. They were defined. They  
7 are identified. They could be given notice. There were 10- to  
8 20,000 of them, and each one had a name and had an opportunity  
9 to have -- to opt out of the class. It's a very unusual kind  
10 of situation.

11 Q By the way, how are you familiar with the NFL concussion  
12 case?

13 A I was involved in that case.

14 Q From your perspective, why is the NFL concussion case  
15 different from the talc cases?

16 A Because all of the -- they are not unknown claimants.  
17 They all knew that they had -- that they had the -- that they  
18 had been what they call sub-concussions over the years and that  
19 they all had an opportunity to get proper notice, to get due  
20 process notice, and an opportunity to opt out.

21 Q Okay. And we heard your discussion during cross about the  
22 Amchem and Ortiz cases with respect to the prospect of  
23 achieving a resolution in the -- in an MDL for the talc  
24 litigation. Why was a class resolution possible in the NFL  
25 concussion case?

1 A I'm sorry?

2 Q Why was a class settlement possible for the NFL concussion  
3 case?

4 A Why was it possible?

5 Q Yes.

6 A Because of the ability -- there were no unknown future  
7 claimants. They were all known future claimants.

8 Q So that difference was significant to that case?

9 A Oh, it was what made all the difference.

10 Q All right. Now, let's turn then to the Deepwater Horizon  
11 case. You're aware that that's a case that Judge Ferguson  
12 discussed in his report as an MDL success story. Is that  
13 correct?

14 A Yes. That was not really a personal injury case. That  
15 was more an economic loss case.

16 Q Was there a global resolution in that case?

17 A There was no global resolution of -- there was a  
18 resolution of the property damage and the economic loss cases.  
19 There was no resolution of -- and there was a resolution of  
20 personal injury cases of people who had immediate injuries as a  
21 result of cleaning up the spill. But there was no resolution  
22 of latent injuries in that case, and those cases are still  
23 continuing.

24 Q And were there unknown future claimants in the Deepwater  
25 Horizon cases?

1 A No.

2 Q The Fen-Phen Diet Drugs cases --

3 A Those are not latent injury cases. Those were cases in  
4 which there was alleged valvular injuries as a result of  
5 ingestion of the drug very soon after that.

6 Q Okay. But there was a global resolution in those cases,  
7 correct?

8 A Yes, there was.

9 Q And then, finally, the Vioxx cases. Can you take us  
10 through the criteria for those as well?

11 A Yes. Vioxx also was not a latent injury case. It was an  
12 injury case that was a global resolution, but it had not -- no  
13 issues of the futures and latent injuries.

14 Q Okay.

15 A And that was resolved in the MDL.

16 Q Okay. So before we turn then to the couple of  
17 non-personal injury cases that were discussed in the TCC's  
18 expert reports, I just want to ask you about the statistics  
19 that you were asked about on cross from Professor Rave's  
20 reports, the 97 percent of cases that are remanded in MDL cases  
21 and the 99 percent of MDL cases that are resolved without  
22 trial. Ms. Birnbaum, do those statistics account for the  
23 presence of latency issues or unknown future claimants?

24 A They do not?

25 Q For the non-personal-injury cases that have -- are

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1 discussed in the expert reports, the Chinese drywall cases,  
2 what type of injuries are present in those cases?

3 A Those were property damage cases.

4 Q And are those cases applicable or helpful to your analysis  
5 here?

6 A Not at all.

7 Q Can you explain why?

8 A They're just not personal injury. They're not latent  
9 injuries. They're not unknown. Everybody knows that they've  
10 had this in their properties. It's just not relevant.

11 Q Okay. And then how about the opioids cases? Can you  
12 explain how those cases relate to your analysis?

13 A They are -- they're very different. Those are not  
14 personal injury cases either. Those are cases by governmental  
15 entities in public nuisance in order to recover for abatement.

16 Q Okay. All right. Then turning back to your rebuttal  
17 report, Ms. Birnbaum. Can you please describe the futures of  
18 bankruptcy that you describe that made it, and as you described  
19 it, the best suited for resolving mass torts when they involve  
20 latent injuries and unknown future claims?

21 A Well, they -- you can get a comprehensive resolution in  
22 which everybody can be treated fairly and the same. Part of  
23 the problem is that when you're in an MDL and there are trials,  
24 some people are winners, and some people are losers. Some win.  
25 Some lose. This is an ability to treat futures and present

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1 claimants similarly situated, similarly, fairly, and equitably  
2 and has many of the tools which the MDL does not provide.

3 Q I think you mentioned this in the context of one of your  
4 responses on cross, but I just want to follow up on this. When  
5 were the Amchem and Ortiz decisions decided?

6 A I believe it was 1998, 1999.

7 Q Okay.

8 A About that period of time.

9 Q All right. And since that time -- and you've been working  
10 on this directly in your work in the context of MDL resolution  
11 work. Is that correct?

12 A Yes.

13 Q So since that time, there have been, to your knowledge, no  
14 examples of MDL case resolutions where the cases involved  
15 latent claims and unknown future claimants?

16 A That's true.

17 MS. O'CONNOR: Okay. Thank you, Ms. Birnbaum.

18 THE WITNESS: Thank you.

19 THE COURT: Mr. Silverstein, let me just ask a quick  
20 question.

21 THE WITNESS: Yes?

22 THE COURT: Ms. Birnbaum, it has been referenced in  
23 many of the pre-hearing submissions pleadings but not discussed  
24 today the 3M earplugs Aearo Technologies case that has been  
25 dismissed in bankruptcy. Do you have a view as to whether or

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1 not that litigation is of a type that is resolvable in the MDL?

2 THE WITNESS: I do not, Your Honor.

3 THE COURT: Okay. Thank you.

4 THE WITNESS: Thank you.

5 RECROSS-EXAMINATION

6 BY MR. SILVERSTEIN:

7 Q Ms. Birnbaum, Dechert represents 3M in the MDL, true?

8 A Yes.

9 Q And Dechert has taken the position that even though there  
10 are no latencies with earplugs in the MDL the case should still  
11 be resolved in bankruptcy, right?

12 A I have not had -- I am not involved in that case, and I  
13 have had nothing to do with that case.

14 Q So as the co-chair of the department, you have no idea  
15 what Dechert's position is on a question of the -- as  
16 significant as 230,000 claims in an MDL?

17 A This is -- we have a wall. I don't have anything to do  
18 with that case.

19 Q And what -- you're walled off from that case?

20 A Yes.

21 Q And is that because of this?

22 A No.

23 Q Now, you're aware that the asbestos MDL is closed, right?

24 A Yes.

25 Q And are you aware of any asbestos defendant with a AAA

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1 credit rating that filed for bankruptcy to resolve its claims?

2 A I don't know that.

3 Q Can you think of any?

4 A No. I have -- I just have no idea.

5 Q Now, with regard to Roundup, you've read Judge Chhabria's  
6 decision, right?

7 A Yes.

8 Q And that's tab 11 of your black binder. You've read this  
9 decision?

10 A Yes.

11 Q And you're aware that at page 4, Judge Chhabria  
12 specifically recognized that the defendant in that case was  
13 "not a situation where the defendant is at risk of going  
14 bankrupt such that only the first set of plaintiffs will ever  
15 be able to recover. Bayer, which recently acquired Monsanto,  
16 is a massive, wealthy company, and it continues to make money  
17 specifically from Roundup sales."

18 That was part of the decision, wasn't it?

19 A It was in the decision.

20 Q And you're also aware -- withdrawn. Have you read the  
21 transcript of the argument on approval of class settlement?

22 A No.

23 Q Are you aware of any of the comments that Judge Chhabria  
24 made about giving notice in a situation where there are  
25 unidentified future claimants?

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1 A Just what's in his decision.

2 Q All right. And so -- and the decision incorporates and  
3 assumes that the reader has read the transcript, correct?

4 A No, I don't think anybody thinks that the reader has read  
5 a transcript when you read an opinion.

6 Q Well, did you read in the very first paragraph that Judge  
7 Chhabria wrote: "The ruling assumes that the reader has  
8 reviewed a transcript on the hearing on the motion for  
9 preliminary approval"?

10 A I don't even know where you might get the transcript.

11 Q Pardon?

12 A I don't even know where you might get the transcript.

13 Q Well, it's at page -- it's at tab 12.

14 A Here it is, yes, but I haven't read it.

15 Q Okay. So you have no idea what Judge Chhabria said --

16 A No, I do not.

17 Q -- about the possibility of giving notice to an  
18 unidentified future claimant?

19 A I did not read that.

20 Q Okay. And if giving notice is problematic in the MDL to a  
21 large, unidentified class of claimants, how do you resolve it  
22 in bankruptcy?

23 A It's a different process.

24 Q And what -- do you know how --

25 A I don't know how you do -- you -- that's the -- the

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1 bankruptcy process gives notice.

2 Q Do you know how due process is given in bankruptcy?

3 A I am not an expert on it.

4 MR. SILVERSTEIN: I have no further questions.

5 THE WITNESS: Thank you.

6 MR. MAIMON: Briefly, Your Honor?

7 THE COURT: Mr. Maimon?

8 RECROSS-EXAMINATION

9 BY MR. MAIMON:

10 Q Ms. Birnbaum, you and I, when I first questioned you, we  
11 discussed the seventh amendment and the state constitutions'  
12 right to a jury trial. You recall that?

13 A Yes.

14 Q And when you were asked by counsel for the debtor, you  
15 discussed due process rights of individuals who get sick in the  
16 future.

17 A Right.

18 Q Do you recall that?

19 A Yes.

20 Q And you and I also discussed and you agreed that there is  
21 no right in any constitution that you're aware of for a company  
22 to globally resolve its liabilities. You recall that?

23 A Yes.

24 Q But still, as a retained witness for Johnson & Johnson,  
25 you say that it's okay to exterminate the seventh amendment and

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1 due process rights of a minority through -- of present cancer  
2 victims and future -- and all future cancer victims through a  
3 bankruptcy because global resolution can be achieved? Is that  
4 your opinion?

5 MS. O'CONNOR: Objection, Your Honor.

6 THE WITNESS: No. My opinion was that --

7 THE COURT: Wait. Wait, wait, wait, wait.

8 THE WITNESS: That is not my opinion.

9 THE COURT: Wait, wait.

10 THE WITNESS: Sorry, Judge.

11 THE COURT: Ms. Birnbaum, just wait.

12 MS. O'CONNOR: Objection, Your Honor. The phrasing  
13 of that question wasn't remotely --

14 THE COURT: Sustained.

15 MS. O'CONNOR: -- what she has testified to.

16 BY MR. MAIMON:

17 Q Is it okay to do away with the seventh amendment and due  
18 process rights of a minority through -- a minority of present  
19 cancer victims and future cancer victims through a bankruptcy  
20 just because global resolution can be achieved?

21 A That's not what I'm saying at all.

22 Q But and you would agree that it's not okay, would you?

23 A I wouldn't agree one way or another. The bankruptcy  
24 process is the bankruptcy process.

25 Q So you wouldn't agree with that one way or the other?

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1 A No.

2 MR. MAIMON: Thank you.

3 THE COURT: All right. Any other questions?

4 MS. O'CONNOR: No, Your Honor.

5 THE COURT: Ms. Birnbaum, thank you for your time  
6 today.

7 THE WITNESS: Thank you very much.

8 THE COURT: You may step down.

9 And --

10 MR. JONES: Good morning, Your Honor. Jim Jones for  
11 the debtor. I believe the order of operations is that Dr.  
12 Mullin takes the stand now and will address part of his report.

13 THE COURT: Correct. Dr. Mullin?

14 Maybe if we can, you know, move the binders, return  
15 them. Thank you.

16 Good -- still morning. Good morning, Dr. Mullin.  
17 Please raise your right hand.

18 MR. MULLIN: Thank you.

19 CHARLES MULLIN, DEBTOR'S WITNESS, SWORN

20 THE COURT: Thank you. Please have a seat and  
21 provide the Court with your name and business address.

22 THE WITNESS: Charles Henry Mullin, 2001 K Street NW,  
23 Suite 500, Washington, D.C.

24 DIRECT EXAMINATION

25 BY MR. JONES:

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1 Q Good morning, Dr. Mullin. Would you please take a look at  
2 what has been placed before you. I believe you're going to  
3 find there are two binders. The first will contain, I believe,  
4 your June 7, 2023, report marked as Exhibit 64. Do you have  
5 that before you?

6 A I do.

7 Q And is, in fact, Exhibit 64 your report of that date?

8 A Yes.

9 Q And I think the second binder will include your report of  
10 June 14, 2023, just a week later. And if all has gone well, it  
11 should be marked Exhibit 65.

12 A It is.

13 Q And that is a true and accurate copy of the rebuttal  
14 report. Is that right?

15 A It appears to be.

16 MR. JONES: Your Honor, I will ask Mr. Mullin one  
17 more question on this point after I make sure that he's got  
18 hydration.

19 Thanks, Tim.

20 BY MR. JONES:

21 Q And that is, Dr. Mullin, do you take -- adopt, rather,  
22 these two reports as your testimony here today as if it were  
23 given on direct and/or rebuttal examination?

24 A I do.

25 MR. JONES: Thank you.

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1 We move the two reports into evidence, Your Honor, at  
2 this time.

3 MR. MAIMON: I object, Your Honor. May I be heard?

4 THE COURT: Yes.

5 MR. JONES: Your Honor, I thought we were reserving  
6 objections.

7 THE COURT: Well, let me just hear the objection.

8 MR. MAIMON: I think I have to make my objection at  
9 this point. We filed an objection to this witness's testimony.  
10 Aside from the substantive objections that we made to the  
11 opinions that he has by way of relevance and by way of  
12 contradicting case law, the witness in his report sets forth  
13 his education, training, and experience. We challenge this  
14 witness on Daubert grounds that this witness is not qualified  
15 to render an opinion on the issues that he's about to. I'm not  
16 talking about his later testimony. But on these issues, he is  
17 not qualified under federal court case law by way of either  
18 education, training, or experience. And I invite the Court to  
19 voir dire or allow us to voir dire on that, because he's simply  
20 not qualified to give those opinions, and no foundation has  
21 been laid for him to do so.

22 THE COURT: Okay.

23 MR. JONES: Your Honor, for the debtor. I believe we  
24 have exchanged papers on this. They have been filed. And the  
25 agreement was to reserve these kinds of objections and take the

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1 testimony conditioned upon that reservation. I would suggest  
2 we proceed in that way unless you have a different view today,  
3 Your Honor.

4 MR. MAIMON: I didn't agree to reserve any  
5 objections, Your Honor, so I don't think that it's fair that  
6 counsel state an agreement that my clients did not enter into.

7 THE COURT: Okay.

8 MR. MAIMON: We have a right to pose the objection.  
9 We also have a right to challenge the qualifications on  
10 cross-examination, which I'm happy to do, but I don't want to  
11 waste the Court's time --

12 THE COURT: No.

13 MR. MAIMON: -- if the Court is going to --

14 THE COURT: No. I --

15 MR. MAIMON: -- if he testifies.

16 THE COURT: I appreciate the objections.

17 MR. MAIMON: Thank you.

18 THE COURT: I've actually -- I've read through the  
19 objections. I'm going to conditionally allow the testimony in  
20 on both aspects subject to the right to cross, subject to the  
21 existing objection. There's much that the Court can learn  
22 and -- from hearing the context and cross-examination. But  
23 counsel is free to explore the initial qualifications as well  
24 on cross.

25 MR. MAIMON: Thank you, Your Honor.

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1 THE COURT: Thank you.

2 MR. JONES: Thank you, Your Honor.

3 MR. SILVERSTEIN: All right. Judge, it's with regret  
4 that we have more binders.

5 THE COURT: Wait. One second.

6 Ms. Richenderfer?

7 MS. RICHENDERFER: Your Honor, I hate to interrupt,  
8 but once again I think those of us in the back row -- I don't  
9 know if it's based on my age or what. We're having trouble  
10 hearing the witnesses today. I don't know if the microphone is  
11 turned on or off. I'm getting agreement from back here. Or  
12 maybe the witnesses just need to speak --

13 THE COURT: Well --

14 MS. RICHENDERFER: -- closer to the microphone.

15 THE COURT: I'll ask you to point the microphone a  
16 little closer to you, but make an effort to speak into it. I'm  
17 looking at our -- let me --

18 MS. RICHENDERFER: Your Honor, you're not coming  
19 across as loud as you usually do also. I mean --

20 THE COURT: Oh, I can take that so many ways, but  
21 here --

22 MS. RICHENDERFER: Your Honor, I'm not getting enough  
23 sleep these days.

24 THE COURT: That's okay. I just raised the volume,  
25 because I thought it was a little -- there. Just ask, and

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1 it -- and you'll get it.

2 MS. RICHENDERFER: And that's why, Your Honor, I was  
3 waiting for a break (indiscernible).

4 THE COURT: That's fine.

5 MS. RICHENDERFER: Okay. Very much appreciate that.  
6 Thank you, Your Honor.

7 THE COURT: Okay. Won't be loud.  
8 Counsel?

9 MR. SILVERSTEIN: Your Honor, may I hand out some  
10 binders?

11 THE COURT: Yes, please. Thank you.

12 CROSS-EXAMINATION

13 BY MR. SILVERSTEIN:

14 Q Dr. Mullin, good morning.

15 A Good morning.

16 Q Approximately how many expert reports in cases governed by  
17 the Federal Rules of Civil Procedure have you signed?

18 A I haven't done the math that way. Some are state court.  
19 Some are federal. Some of the federal -- or some of the state,  
20 I think, have adopted federal rules, so I'm not sure. I  
21 probably have over a hundred expert reports at this point, but  
22 I couldn't break it down federal versus state.

23 Q And you understand in this case that your expert report --  
24 withdrawn. You understood when you prepared your expert report  
25 that it would serve as your direct testimony, true?

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1 A I was aware that it was a possibility.

2 Q And this isn't the first time that you've prepared an  
3 expert report where the report served in lieu of live direct  
4 testimony, is it?

5 A On a limited number of occasions that's happened.

6 Q Now, I want to ask you some questions about your direct  
7 testimony as opposed to your rebuttal testimony. Okay?

8 A Okay.

9 Q In your direct testimony, your direct report, which is  
10 Exhibit D-64, you discuss the comparative efficiencies and  
11 equities of the bankruptcy versus the tort system on pages 54  
12 through 67 of your report, paragraphs 113 through 142, correct?

13 A Correct.

14 Q And you agree, Dr. Mullin, that the comparison of the two  
15 systems only becomes relevant if a debtor has the requisite  
16 financial distress for file -- to file for bankruptcy, true?

17 A You can always make the comparison. I guess it's only a  
18 salient question if both avenues are potentially available.

19 Q Well, Dr. Mullin, before LTL ever filed for bankruptcy on  
20 October 14, 2021, you testified that to be in bankruptcy and  
21 avail yourself of the tools in bankruptcy, an entity does not  
22 need to be insolvent. You just need to be in financial  
23 distress, true?

24 A In the context of a different matter. I think you showed  
25 me some deposition testimony where that was part of my answer.

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1 Q You testified to that, correct, that you don't need to be  
2 insolvent. You just need to be in financial distress to be in  
3 bankruptcy, correct?

4 A I gave that as part of an answer to a question. That's  
5 correct.

6 Q Okay. And are you suggesting that whether you need to  
7 be -- whether you need to have financial distress and to be in  
8 bankruptcy is applicable in one case and not in another?

9 A I didn't define what financial distress meant in that  
10 answer. I gave an answer to a question in a context. And I'm  
11 not offering there or here a legal opinion. I gave an answer,  
12 and I gave my understanding.

13 Q Now, on pages 62 to 67, paragraphs 136 to 142 of your  
14 opening report, you state opinions as to why bankruptcy  
15 reorganization provides a more equitable avenue to resolve tort  
16 claims, right?

17 A Correct.

18 Q And your opinions in those paragraphs are based on your  
19 comparison of a bankruptcy paradigm on the one hand with a tort  
20 system paradigm on the other, true?

21 A It's a relative comparison. Correct.

22 Q And the relative comparison is on the one hand a  
23 negotiated plan of reorganization where all tort claims are  
24 channeled to a trust with no unimpaired opt-out rights against  
25 the debtor receiving a super majority vote, true?

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1 A And there's a plan that's confirmed subject to the rules  
2 of bankruptcy, correct.

3 Q That's the one -- that's one point of comparison that you  
4 make, true?

5 A Correct.

6 Q And then the other point of comparison is tort claims are  
7 tried in what you call lottery -- to lottery-like verdicts,  
8 true?

9 A That comparison is made. Correct.

10 Q And based on your comparison of an overwhelmingly  
11 consensual bankruptcy trust versus cases going to verdict into  
12 the tort system, you conclude in paragraph 142 that the  
13 processing and payment of claims by a bankruptcy trust is  
14 superior in equity terms to the lottery-like outcomes  
15 experienced in the tort system, fair?

16 A That is an element that went into that conclusion,  
17 correct?

18 Q And but you agree, Dr. Mullin, that 99 percent of cases in  
19 the tort system are eventually resolved without trial, true?

20 A Generically across all cases, true.

21 Q 99 percent of the cases are settled, right?

22 A Not necessarily for a given tort but across all torts in  
23 general, true.

24 Q And yet, Dr. Mullin, you don't in that direct testimony  
25 anywhere in comparing the two paradigms ever discuss

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1 settlement, correct?

2 A As we discussed in my deposition, I somehow lost the  
3 paragraph or two that normally discusses that. It's not there.  
4 It's covered in the rebuttal reports. But that was  
5 inadvertently omitted. That's correct.

6 Q So in your direct -- in your expert report that you  
7 understood would be your direct testimony, you inadvertently  
8 excluded any reference to the fact that in the tort system,  
9 horizontal equity can be achieved through one or more master  
10 settlement agreements, correct?

11 A I disagree with that conclusion. You just said horizontal  
12 equity --

13 Q Okay.

14 A -- could be obtained. I think as we just heard earlier  
15 today, even -- and to me, Professor Rave's testimony  
16 underscored the difference. He talked about Actos.

17 Q Let me --

18 A The settlement resolved the pending claims and put  
19 disincentives for future -- for lawyers to file future claims.  
20 And then apparently they didn't. So a successful settlement  
21 was one where the future claims don't even get represented or  
22 filed. That underscores the inequity. The future claimants  
23 aren't being treated the same as the pendings. So horizontal  
24 equity is a very different question than can you reach a  
25 settlement.

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1 Q And none of that is discussed in your direct testimony, is  
2 it? Your direct testimony compares exclusively a bankruptcy  
3 trust to lottery-like verdicts, true?

4 A It's correct that those paragraphs were omitted.

5 Q Okay. And how many hours did you and your team spend on  
6 the report?

7 A I couldn't give you a count sitting here.

8 Q Tens of hours, true?

9 A Probably hundreds of hours.

10 Q Now, in your conclusion in paragraph 142, you state that  
11 in contrast to the tort system, a trust established through  
12 bankruptcy reorganization specifies a common set of rules for  
13 payment of claims, right?

14 A Correct.

15 Q You agree that a master global settlement in the tort  
16 system can specify a common set of rules for determining the  
17 payment of claims as well, true?

18 A If you have a single global resolution for all claimants,  
19 yes.

20 Q So it's not in contrast entirely to the tort system, is  
21 it?

22 A I'm aware of the Vioxx settlement that was truly global.  
23 The others generally are series of master settlement agreements  
24 struck on a law-firm-by-law-firm basis. And those don't have  
25 the property of horizontal equity.

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1 Q Because claimants are being treated horizontally within  
2 their group as opposed to across every single claimant, right?

3 A Based on the identity of their plaintiff's attorney as  
4 opposed to maybe the merits of the case.

5 Q All right. Now, you also agree -- you also state in  
6 paragraph 142 that the rules pertaining to the bankruptcy trust  
7 system reflect the objective factors the bankruptcy court  
8 recognizes as materially affecting claim values such as the  
9 claimant's injury, age, lost income, alternative exposure  
10 sources, dependents, and life status, right?

11 A I do give a series of examples.

12 Q And you agree that a global master settlement agreement in  
13 the tort system can reflect the objective factors that the  
14 parties recognize as materially affecting claim values such as  
15 claimant's injury, age, lost income, and the like, right?

16 A Correct.

17 Q And so master global settlements in the tort system can  
18 also pay claimants based on a grid or point system like a  
19 trust, correct?

20 A It can.

21 Q Now, just to come back to your wording about the lottery-  
22 like results, your view is that litigation in the tort system  
23 operates akin to a lottery; true?

24 A It can.

25 Q And that's because different juries can reach different

Mullin - Cross/Silverstein

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1 results based on a similar set of issues; right?

2 A Correct, that's one aspect of it.

3 Q In other words, juries can differ from each other on an  
4 outcome; correct?

5 A Correct.

6 Q And you agree that judges also can differ on opinion on a  
7 similar set of issues; correct?

8 A It's a trait of human beings generally.

9 Q So -- but have you ever called the bankruptcy system a  
10 lottery-like system?

11 A It's -- I don't think I've referred to that as a lottery-  
12 like system, no.

13 Q All right. Now, in comparing the equity of a bankruptcy  
14 trust on the one hand and resolution of the tort system on the  
15 other, you didn't put explicit weight on the cost to claimants  
16 in the bankruptcy system of forfeiting their Seventh Amendment  
17 right to a jury trial; correct?

18 A I'm aware there's still a jury trial option through  
19 trusts, but I did not put a dollar weight on that figure.

20 Q And that's because, in your view, nobody exercises that  
21 right in any setting, it's impractical and in every setting  
22 almost everybody ends up with a negotiated settlement; true?

23 A In the context of mass torts with tens of thousands or  
24 hundreds of thousands of claims, that's true.

25 Q You put no weight on the cost to claimants of forfeiting

Mullin - Cross/Silverstein

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1 their jury rights because, in your words, 99 percent settle and  
2 the vast, vast majority are going to settle through a  
3 negotiated framework, it's the only thing that's practical in  
4 mass torts; right?

5 A I don't think I put no weight. I didn't put a monetary  
6 value on it. I'm aware that there's a difference between the  
7 systems, so I'm aware that that difference exists. When you  
8 say put weight on it, in terms of the efficiency and equity  
9 arguments, it doesn't change the conclusions on those two  
10 arguments.

11 Q Dr. Mullin, it follows from your testimony that, if this  
12 bankruptcy case is dismissed, you believe the only thing that's  
13 practical is that the vast, vast majority of Johnson &  
14 Johnson's and LTL's talc claims will settle through a  
15 negotiated framework; true?

16 A Ultimately, you can't try a hundred thousand cases, so  
17 they aren't going to resolve through a hundred thousand trials.  
18 There's not the capacity in the tort system for that, so it has  
19 to have an ulterior resolution route, whether that's settlement  
20 or some form of dismissal.

21 Q Now, it's your opinion that the bankruptcy system is  
22 superior to the tort system for resolving LTL's talcum powder  
23 claims; true?

24 A Given the facts of this litigation, yes.

25 Q And the reason for that relates to the existence of future

Mullin - Cross/Silverstein

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1 claims and long latencies, primarily; correct?

2 A That's a key distinguishing feature in this matter, yes.

3 Q And there were future claims and long latencies when the  
4 MDL was formed in 2016; right?

5 A There was still an open question of whether or not general  
6 causation had been (indiscernible) forward. So, if there's no  
7 general causation, in essence, there's no latency. So that's  
8 tied, which is the only hesitation.

9 So, conditioned on plaintiffs prevailing on a causal  
10 argument, there's latency.

11 Q So it's your view that if J&J believed in 2016 it had high  
12 odds of winning the Daubert motion that the MDL might have been  
13 the preferred method for resolving this case; correct?

14 A Well, the preferred method for addressing that particular  
15 legal defense.

16 Q If J&J believed in 2016 that it had high odds of winning  
17 the Daubert motion, remaining in the MDL may have been the  
18 preferred method to filing for bankruptcy protection; true?

19 A So, at least through the resolution of the Daubert issue,  
20 that could be true.

21 Q So take the case through Daubert, see how that happens,  
22 then decide whether to file for bankruptcy or not; correct?

23 A The facts change at that point. As a pure economic  
24 decision, the circumstances would shift and the resolution of  
25 that.

Mullin - Cross/Maimon

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1 Q Dr. Mullin, you can't testify when bankruptcy became a  
2 superior form within which to resolve LTL's talc claims, can  
3 you?

4 A I wasn't asked to try to put a date on that question.

5 Q And so, logically, it follows from that that you cannot  
6 conclude today that up until the moment that LTL filed for  
7 bankruptcy on October 14th, 2021, the MDL was as good, if not  
8 superior, to bankruptcy for resolving LTL's claims; right?

9 A I don't believe that's true.

10 Q If you can't point to any time in which bankruptcy became  
11 a superior option for resolving the claims, doesn't it follow  
12 that you can't point to a time when the MDL stopped being as  
13 good, if not better, a form to resolve the claims than  
14 bankruptcy?

15 A That logic is flawed, no. I'm happy --

16 MR. SILVERSTEIN: I have no further questions.

17 THE WITNESS: -- to explain, if you'd like.

18 THE COURT: No further questions?

19 MR. SILVERSTEIN: No, thank you.

20 THE COURT: Mr. Maimon?

21 MR. MAIMON: Yes, thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. MAIMON:

24 Q It's still good morning, Dr. Mullin. I'll be brief.

25 A Good morning.

Mullin - Cross/Maimon

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1 Q You have a -- I'm just looking at your profile on your  
2 website -- you have a B.A. in mathematics and economics from  
3 the University of California Berkeley?

4 A Correct.

5 Q And you have a PhD in economics from the University of  
6 Chicago; correct?

7 A Correct.

8 Q By way of education, did either of those educational paths  
9 that you took deal at all with bankruptcy law?

10 A I don't remember all the course detail well enough. At  
11 times you touch on law in economics topics, but there wasn't a  
12 course focused on bankruptcy law.

13 Q And there wasn't a course and you didn't take courses  
14 dealing with multi-district litigation and how it works when  
15 you were either in your undergraduate or in your PhD program;  
16 correct?

17 A Correct.

18 Q You are not a lawyer, are you?

19 A Correct.

20 Q You didn't go to law school?

21 A I did not.

22 Q You're certainly not a judge, are you?

23 A No.

24 Q Have you ever practiced in -- you've never practiced in  
25 Bankruptcy Court; correct?

Mullin - Cross/Maimon

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1 A Practiced law?

2 Q Yes.

3 A No.

4 Q Have you ever been appointed by a judge in any court as an  
5 independent expert?

6 A I think technically every expert is an independent expert  
7 in the British system and I've done some cases in the British  
8 system. Other than that --

9 Q How about -- let's talk --

10 A -- technicality --

11 Q -- about the United States --

12 A -- no.

13 Q -- of America.

14 MR. JONES: Your Honor, will he let the witness  
15 finish his answer, please?

16 MR. MAIMON: I thought he did. I'm sorry.

17 THE COURT: Have you completed your answer?

18 THE WITNESS: Yes.

19 THE COURT: Okay.

20 BY MR. MAIMON:

21 Q In the United States of America, you've never been  
22 appointed as an independent expert by a judge; correct?

23 A Correct.

24 Q You talked about lottery-size verdicts and those are  
25 verdicts that are rendered by jurors, correct, that you're

1 referring to?

2 A Correct.

3 Q You're aware, are you not, that sometimes in the civil  
4 litigation system there are bench trials that are decided by  
5 judges?

6 A There can be.

7 Q And you're aware that different judges view it different  
8 when they sit as finders of fact, they view things differently  
9 and come to different outcomes even though, to an outside  
10 observer like yourself, they might be a similar set of issues?

11 A Yes.

12 Q So you might have a cancer victim who has a bench trial  
13 who receives X from one judge and X plus Y from another judge;  
14 right?

15 A You could.

16 Q That doesn't make the X-plus-Y judge's verdict a lottery,  
17 does it?

18 A I mean, none of them are lotteries explicitly. It's an  
19 analogy talking about the variability and the outcomes, and the  
20 vast variability of outcomes that you see. It's not meant to  
21 be taken literally as you have a lottery ticket --

22 Q Yeah.

23 A -- it's simply an analogy.

24 Q Having cancer is not a lottery ticket, is it?

25 A Having cancer?

Mullin - Cross/Maimon

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1 Q Having cancer is not a lottery ticket, is it?

2 A It's a negative outcome. So no, in that sense.

3 Q And you're not suggesting that any of the plaintiffs are  
4 out to win a lottery by bringing their lawsuits; are you?

5 A Quite to the contrary. Most plaintiffs would prefer the  
6 expected value over the same number in expectation with a lot  
7 of variance about it. People buy insurance to avoid risk.

8 Q Have you ever spoken to a plaintiff in talc litigation?

9 A A plaintiff in talc litigation, no.

10 Q Have you ever spoken to a mesothelioma victim?

11 A No.

12 Q Why do you presume to tell this Court what you think they  
13 want?

14 A From risk aversion and settlement? There's --

15 Q No, why do you presume to tell this Court what you think  
16 they want?

17 MR. JONES: Objection, Your Honor. I don't think  
18 that's a part of any opinion Mr. Mullin --

19 MR. MAIMON: He just said that they want.

20 THE COURT: Overruled.

21 THE WITNESS: There's a whole branch of the economics  
22 literature that looks at choices and behavior, and looks at  
23 risk avoidance, and there's huge -- lots of literature, people  
24 prefer to avoid risk across a wide variety of environments.  
25 And so, if the idea is, you have a ten percent chance of

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1 winning a million dollars at trial, or you can get \$100,000 for  
2 free, from an economic perspective, that's the same thing as  
3 betting \$100,000 at ten-to-one odds. People don't do that,  
4 behaviorally, across a wide variety. From an economic  
5 perspective, they're better off taking the certain sum of the  
6 expected value.

7 BY MR. MAIMON:

8 Q And so you're speaking from an economic perspective;  
9 right?

10 A Correct.

11 Q Because that's your area of expertise; correct?

12 A Correct.

13 Q Okay. And you talk about horizontal equity; right? And  
14 that means treating similarly-situated people similarly; right?

15 A Correct.

16 Q Okay. Who's the judge of whether or not two people are  
17 similarly situated?

18 A Those are typically negotiated across the parties in the  
19 rules of the trust.

20 Q You are not the arbiter of what two individuals are  
21 similarly situated; are you?

22 A Not myself personally, no.

23 Q Okay. And to -- horizontal equity eliminates a jury's  
24 analysis of the individual circumstances of a specific, unique  
25 human being; correct?

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1 A Eliminate, I think, is going a little too far. You're not  
2 -- so if you -- the same individual is going to -- if they go  
3 to a jury trial, a jury will be empaneled. If they went three  
4 weeks later, they'd get a different jury. Those two juries may  
5 come to very different conclusions. So you're not eliminating  
6 the second jury because you went to the first, you're not  
7 eliminating the first because you went to the second. You're  
8 getting one read from one group of jurors about an outcome for  
9 that person that other jurors may give completely different  
10 reads to.

11 And so it's, when you're saying eliminate, any settlement  
12 context, yes, you're no longer pooling a jury and asking what  
13 are they valuing that particular case at, that is correct.

14 Q Well, most cases in the United States, most tort cases are  
15 negotiated on an individual basis, correct, not on a mass tort  
16 basis?

17 A Well, by count, most are a mass tort. So, on count, most  
18 are actually negotiated in a mass tort framework because  
19 there's a limited number of mass torts, which are a very large  
20 fraction of the cases.

21 Q Automobile accident cases, they negotiate them one at a  
22 time; right, usually?

23 A Typically, yes.

24 Q Okay. And what I'm asking you is, if you take all of them  
25 and determine what the similarly-situated plaintiffs are and

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1 require horizontal equity, what you've done is you've  
2 eliminated a jury's consideration and analysis of the  
3 individual circumstances of specific, unique human beings;  
4 correct?

5 A If you create any type of master settlement framework  
6 where people aren't going to a jury any longer, you're no  
7 longer asking the jury that, that's correct.

8 Q Correct. And if you force that upon people and don't give  
9 them the right to opt out, you've taken away their right to be  
10 considered for their specific, unique human characteristics and  
11 situations; correct?

12 A If there's no jury trial option available, that would be  
13 correct.

14 Q Thank you.

15 MR. MAIMON: Those are all the questions I have.

16 THE COURT: Thank you.

17 Other counsel? Redirect?

18 MR. JONES: Very few, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. JONES:

21 Q Dr. Mullin, your accurate CV is attached to your opening  
22 report, which I believe is Exhibit 64.

23 A Yes.

24 Q And it remains accurate and explains your academic and  
25 other professional background as of today?

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1 A I don't --

2 THE COURT: I'm sorry, where is the CV?

3 MR. JONES: It should be Appendix A to the --

4 THE COURT: To his report?

5 MR. JONES: His report.

6 THE COURT: Oh, I'm sorry, it's in the initial  
7 report.

8 MR. JONES: Appendix A, curriculum vitae of Charles  
9 H. Mullin, page A-1.

10 BY MR. JONES:

11 Q Is it in your notebook, at least, Dr. Mullin?

12 A Yes, it's D-64.74.

13 THE COURT: Thank you.

14 MR. JONES: Are you there, Your Honor.

15 THE COURT: I am here.

16 MR. JONES: All right, thank you. I'm just asking  
17 Dr. Mullin if it remains a true and accurate copy of his  
18 curriculum vitae today, and his academic background and  
19 professional experience.

20 THE WITNESS: Yes.

21 BY MR. JONES:

22 Q Thank you, Dr. Mullin. And, Dr. Mullin, you have, as your  
23 report indicates, testified before in matters in Federal Court  
24 and Bankruptcy Court?

25 A Correct.

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1 Q And you have been qualified to so testify as an expert in  
2 economic statistics and economic modeling?

3 A Correct.

4 Q A number of times?

5 A Yes.

6 Q Indeed, you testified in this courtroom, in this  
7 courthouse, in February of '22 by report and by cross-  
8 examination?

9 A I'll trust you on the date, but, yes, I was in this  
10 courthouse.

11 Q And you testified in the Federal Bankruptcy Court in North  
12 Carolina in the first iteration of this bankruptcy proceeding,  
13 or in LTL 1, as people have referred to it over the last few  
14 days, in or about October of '21 on issues similar to your  
15 report here today?

16 A Correct.

17 Q And Judge Whitley qualified you to do so on that day, or  
18 at least you were permitted to do so on that day?

19 A Correct.

20 Q And you frequently also testify on matters that relate to  
21 the valuation of mass tort liabilities --

22 A Correct.

23 Q -- in Bankruptcy and in Federal Court?

24 A Correct.

25 Q And you frequently testify about the tools available in

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1 MDL proceedings, in the tort system more broadly, and the tools  
2 available in bankruptcy to resolve mass tort liability from an  
3 economics and statistical and economic modeling perspective?

4 A Correct.

5 Q And you have done that from time to time in Bankruptcy  
6 Court at least?

7 A Correct.

8 Q And, sir, in your experience testifying on these matters  
9 as an expert witness have you ever had your testimony either  
10 stricken, to your knowledge, or have you ever been the subject  
11 of a successful motion to disqualify you from so testifying, to  
12 your knowledge?

13 THE COURT: Wait, wait. Don't answer.

14 MR. MAIMON: I object, Your Honor. Those aren't  
15 binding on Your Honor. Your Honor is the gatekeeper in this  
16 court and what other courts have done is irrelevant.

17 THE COURT: Objection overruled. I understand.

18 BY MR. JONES:

19 Q You may answer, sir.

20 A I have been permitted to testify in all the prior  
21 instances.

22 Q Thank you, Dr. Mullin.

23 Dr. Mullin, you heard an earlier witness today discuss the  
24 ACTOS case and you mentioned it briefly on cross-examination.  
25 And in fact, I think at one point you were giving at least a

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1 partial explanation of why the ACTOS lawyers, those  
2 representing claimants in that case, may have been  
3 disincentivized to file or pursue future claims. Do you recall  
4 that testimony, first from the earlier witness today and from  
5 your own cross-examination a few moments ago?

6 A Yes.

7 Q Could you explain what you meant by what you said and  
8 otherwise please react to the earlier witness' testimony?

9 A So, to me, Professor Rave's description of both the ACTOS  
10 matter and then opioids where there were disincentives for  
11 attorneys to either bring future ACTOS claims or to represent  
12 future municipalities as a way of curtailing the unknown future  
13 claims, it curtails them by setting them to zero. No one  
14 represents them, so they don't come forward, which, as an  
15 economist, is a very inequitable outcome.

16 And so while I took from his testimony this morning that  
17 Professor Rave viewed that as a success story and that that  
18 agreement resulted in very little, if any, ongoing ACTOS  
19 litigation. So the pending claimants and the defendant strike  
20 a deal, and the future claimants don't get representation or  
21 come forward. That doesn't strike me as equitable as an  
22 economist; you're setting to zero the value of future claims.

23 Setting future municipalities to zero by discouraging  
24 people from representing them also doesn't strike me as  
25 equitable. You're getting inequitable outcomes across your

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1 future claimant group and your pending claimant group, as  
2 Professor Rave described those two outcomes.

3 Q Thank you, Dr. Mullin.

4 Dr. Mullin, you also heard mention earlier today -- you  
5 were in the courtroom all morning?

6 A Yes.

7 Q And you also mentioned today the Aearo case, at least on  
8 the examination of Ms. Birnbaum. Are you familiar with the  
9 Aearo case?

10 A I am.

11 Q And do you have a view about the Aearo case and its facts  
12 and this case?

13 A I have to be careful because I've got to just make sure I  
14 don't say anything that's confidential in that.

15 So, as the key distinguishing factor in terms of latent  
16 injury, there -- while there may be latent claims in Aearo, as  
17 for active military there's stays on statute of limitations, so  
18 there may be future claimants, there's not an argument of  
19 latent injury. So you don't have the late manifestation of  
20 injury problem that you have here, and so that distinguishes  
21 those two.

22 Q Thank you, Dr. Mullin.

23 Back to ACTOS for a minute. I think it was your view that  
24 there would be discouragement of future claim pursuit; how is  
25 that the case -- why is that the case?

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1 A So, as Professor Rave was describing it earlier today, he  
2 said there were economic incentives or disincentives for  
3 plaintiffs' counsel to represent future claimants were put into  
4 those agreements. I'm going to off of his testimony as he  
5 described it this morning, those are not settlement agreements  
6 that I have read.

7 Q All right. Thank you, Dr. Mullin.

8 At the end of one of your questions on cross-examination,  
9 I think it was Mr. Silverstein, to my right, was inquiring of  
10 you concerning your view about the superiority of the  
11 bankruptcy system to the tort system in resolving claims like  
12 talc claims, and he was questioning you about when in time or  
13 on what date would it have been apparent that the bankruptcy  
14 system was superior, and I thought you were trying to explain  
15 an answer and did not proceed. Could you explain the answer  
16 now, if you care to?

17 A So, while I wasn't asked to find a specific date and I  
18 don't have a specific date as to when that transition occurred,  
19 there -- in mass torts where there's a general causation  
20 argument, playing out general causation through the tort system  
21 and seeing if general causation can go to trial or not, in the  
22 fact pattern where you believe you have a material chance of  
23 winning that you can't establish general causation, resolving  
24 that issue first makes complete sense because that could  
25 potentially end the entire litigation in one fell swoop and

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1 then you -- when the plaintiffs prevail on that issue, you've  
2 passed over a hurdle that's a gate-keeping function to go  
3 forward. Now you have the tens of thousands of claims, now you  
4 have the tens of thousands of potential future claims, and the  
5 mechanism -- I think it was in Professor Rave's report, but I  
6 may be confusing the two experts -- even talked about the fact  
7 that there's that ability for a defendant to get a universal  
8 victory, but not really an ability for a plaintiff to get a  
9 universal victory in those early stages of the MDL.

10 So it makes sense to play that out. In terms of the exact  
11 timing of transition, I am aware that LTL was trying to attach  
12 itself to the Imerys bankruptcy. So it had already  
13 transitioned to try to resolve it through bankruptcy -- not  
14 through its own bankruptcy filing, but through attaching itself  
15 to the Imerys bankruptcy, you know, that predates by a  
16 substantial period of time the filing in 2021.

17 Q Thank you, Dr. Mullin.

18 You were asked about an omitted paragraph or paragraphs  
19 from your initial report regarding horizontal equity, I think  
20 was the topic, and settlements, and I just want to make sure  
21 that for His Honor that the record is clear. Your opinions on  
22 that matter are indeed contained in your rebuttal report; is  
23 that fair?

24 A Correct. The substance of those appears in the rebuttal  
25 report, that's correct.

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1 Q Thank you. It was a bit of housekeeping, I appreciate it.  
2 Dr. Mullin, you were asked a time or two about the  
3 percentage of cases that resolve without trial in the tort  
4 system and I think your answer was that you could not disagree  
5 with the view that it as 98 or 99 percent; do you recall  
6 testimony or that inquiry, in any event?

7 A Yes.

8 Q And at one point I thought maybe the question moved from  
9 resolved in the tort system to settled or that -- and I want to  
10 ask you if those, in your view, are the same thing and what  
11 that means for the percentage that you discussed with your  
12 examiner.

13 A Well, I generally use the term settled to mean settled  
14 with payment, while resolved is the case is terminated for any  
15 reason, which would include settlement, but could also include  
16 dismissals without payment.

17 Q Thank you, Dr. Mullin.

18 You heard others discuss today the NFL concussion case,  
19 and you understand that case to figure prominently in the  
20 reports of certain of the experts for the TCC or the claimants  
21 in this case. Both did you hear that testimony and am I right  
22 about figuring prominently?

23 A They both use it as an example. I try to avoid adjectives  
24 and adverbs, usually --

25 Q All right.

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1 A -- but they both use it as an example.

2 Q I appreciate your willingness to constrain yourself. Let  
3 me ask you this question about that.

4 And I don't want you to, you know, unnecessarily repeat  
5 testimony that His Honor has already heard, but your reaction  
6 to that use, that is the use of the NFL concussion case, as an  
7 example of -- in the reports of the experts that you reviewed  
8 and heard testify today?

9 A It's factually very distinct. There's about 20,000 former  
10 NFL players, the NFL knows exactly who they all are; they are  
11 their former players from rosters, they know in general how to  
12 contact them. So your ability to identify and give notice is  
13 fundamentally different than, you know, a product you buy on a  
14 grocery store shelf in terms of who are the potential  
15 claimants, and I think about one percent of them did opt out  
16 after receiving notice.

17 Q And you also heard mention this morning, earlier in the  
18 morning of the asbestos MDL and testimony to the effect that  
19 certain defendants, apparently, resolved both shortly after the  
20 MDL was dispatched or maybe during it, and you have seen that  
21 used as a comparator to this case in the reports of experts in  
22 this case; am I right?

23 A Yes.

24 Q So you heard the testimony and you're aware of the  
25 comparison?

1 A Yes.

2 Q And could you share with us your view of that comparison?

3 I think it's mentioned in your report, but could you share with  
4 us your view of that comparison?

5 A So the mesothelioma claimants in this are really a direct  
6 extension of asbestos litigation. The allegation is an  
7 asbestos taint within the talcum powder that leads to the  
8 development of the claimants' mesothelioma. So it's just  
9 another asbestos-containing product, like the myriad of  
10 asbestos-containing products that have been through the history  
11 of the tort now for going on half a century.

12 The ovarian cancer claims share very similar  
13 characteristics with the long latency for disease potentially.  
14 And so when you look at what's the most applicable analogy, to  
15 me, it really is the asbestos shows the fact pattern and, while  
16 that MDL is closed, the MDL didn't result in the termination of  
17 asbestos litigation for any defendant in the MDL. So it didn't  
18 wrap up the tort, it just reverted back and they're all in  
19 state court.

20 Q And certain are not in the state court for other reasons;  
21 is that right? Certain of the defendants in that MDL are not  
22 in state court or any court at this moment because they were  
23 resolved otherwise; correct?

24 A Well, so I think it's depending on how you want to count  
25 an asbestos bankruptcy, people count them different ways, but

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1 like the Crowell & Moring list that's up on their website  
2 lists, I think, about 140 entities now that set up 524(g)  
3 trusts as part of a bankruptcy reorganization. Not all of them  
4 went in necessarily because of asbestos liabilities as the  
5 motivating filing, but many of those were explicitly because of  
6 asbestos claims was the motivation for the filing.

7 Q You were in the courtroom when one of the experts for the  
8 claimants here mentioned notice of class-wide settlement as a  
9 procedure through which unknown future claimants could be  
10 apprised of a pending resolution; did you hear that testimony?

11 A I did.

12 Q And in fact the Judge inquired about notice. Could you  
13 share with us your views of notice in that setting for purposes  
14 --

15 MR. SILVERSTEIN: Your Honor, we've all given this a  
16 lot of latitude. At this point, Dr. Mullin, who's an  
17 economist, is being asked about notice in class actions. I  
18 think we're well outside of his expertise and I object.

19 MR. JONES: Your Honor, it involves the underpinnings  
20 for his opinion about the extent to which, as a matter of  
21 economics, one or the other resolution systems is more  
22 efficient, and I'm asking the question for that reason.

23 THE COURT: I'll sustain the objection.

24 MR. JONES: All right.

25 (Pause)

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1 MR. JONES: That's all I have, Your Honor.

2 THE COURT: All right, thank you.

3 Any recross?

4 MR. SILVERSTEIN: Yeah, very few, just to clear up a  
5 few items.

6 RE CROSS-EXAMINATION

7 BY MR. SILVERSTEIN:

8 Q First, Dr. Mullin, you're not disputing that at your  
9 deposition you said 99 percent of mass tort cases settle;  
10 right?

11 A If that's what it says in my deposition.

12 Q Well, you can turn to page 193 of your testimony, which is  
13 Tab 1 in the black binder. And let me know when you're there,  
14 please.

15 A Tab 1 in my binder?

16 THE COURT: Tab A or --

17 BY MR. SILVERSTEIN:

18 Q Page 193, Tab 1 of your --

19 A It's not Tab 1.

20 THE COURT: Yeah, it's either Tab A or B.

21 MR. SILVERSTEIN: I'm sorry, A. I apologize.

22 THE COURT: And page 191?

23 MR. SILVERSTEIN: 193.

24 THE COURT: 193.

25 MR. SILVERSTEIN: Oh, my --

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1 THE COURT: Tab B.

2 MR. SILVERSTEIN: It's Tab B.

3 THE COURT: Tab B.

4 BY MR. SILVERSTEIN:

5 Q So let me know when you're there, Dr. Mullin.

6 You're not disputing that when you were asked about the  
7 weight that you put on claimants not being able to exercise  
8 their Seventh Amendment rights in bankruptcy, you testified --  
9 when I asked you, "Hardly anyone avails themselves of a jury  
10 trial, is that what you're saying?"

11 "We talked about this earlier, 99 percent settle."

12 That's what you said?

13 A Yes.

14 Q Okay. Now, another point of clarification, in the Aearo  
15 bankruptcy there were thousands of respirator claims alleging  
16 silicosis and other diseases, including from exposure to  
17 asbestos in that case, where there were latencies; correct?

18 A I don't know the count. My retention didn't cover the  
19 respirator claims. I'm aware the respirator claims were a part  
20 of it and they would have latent injuries.

21 Q And those claims were dismissed as part of the bankruptcy,  
22 you understand that?

23 I'm sorry, the bankruptcy resolution of those claims was  
24 dismissed with the rest of the bankruptcy?

25 A Correct.

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1 Q With regard to ACTOS, future claimants were entitled to  
2 hire lawyers to represent them if they developed illness;  
3 correct?

4 A Correct.

5 Q Okay. And you've given a lot of testimony about equity  
6 from a law and economics perspective. You would agree that  
7 giving claimants the choice to decide whether to resolve their  
8 claims or not is equitable; correct?

9 A In an ideal world, when you have a hundred thousand  
10 claims, there's a practical reality that, if all hundred  
11 thousand elect the choice of wanting to try their case, it  
12 can't -- the systems can't handle it.

13 Q But we know that doesn't happen --

14 A Well --

15 Q -- because 99 percent settle; right?

16 A Ninety nine percent across all torts eventually resolve  
17 their cases without trial, correct.

18 Q And that's what's likely to happen here?

19 A I don't think you can draw that conclusion given the  
20 litigation history that's gone on in this case.

21 MR. SILVERSTEIN: No further questions.

22 MR. MAIMON: Nothing further, Your Honor.

23 THE COURT: All right. Dr. Mullin, until this  
24 afternoon, thank you, you may step down.

25 THE WITNESS: Thank you.

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1 THE COURT: Perfect time for lunch. Let's come back  
2 and start by 1:15.

3 MR. JONES: Thank you, Your Honor.

4 THE COURT: Thank you.

5 (Recessed at 12:19 p.m.)  
6

7 **C E R T I F I C A T I O N**

8 We, DIPTI PATEL, LIESL SPRINGER, and TRACEY WILLIAMS,  
9 court approved transcribers, certify that the foregoing is a  
10 correct transcript from the official electronic sound recording  
11 of the proceedings in the above-entitled matter, and to the  
12 best of our ability.  
13

14 /s/ Dipti Patel

15 DIPTI PATEL  
16

17 /s/ Liesl Springer

18 LIESL SPRINGER  
19

20 /s/ Tracey Williams

21 TRACEY WILLIAMS

22 J&J COURT TRANSCRIBERS, INC.

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